83-430

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No.

IN THE

Supreme Court of the United States

October Term, 1983

LOUIS HEIMBACH, Individually and as County Executive of Orange County, on behalf of all persons in Orange County liable for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York; and PETER F. COHALAN, Individually and as County Executive of Suffolk County, on behalf of all persons in Suffolk County liable, for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York,

Appellants,

against

THE STATE OF NEW YORK and JAMES H. TULLY, JR., as the Commissioner of the New York State Tax Commission,

Appellees,

WARREN M. ANDERSON, as Temporary President and Majority Leader of the New York State Senate,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

Jurisdictional Statement on Appeal for the Court of Appeals of the State of New York

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Dated: September 12, 1983

Questions Presented.

1. Whether or not a special sales and compensating use tax (as distinguished from a levy upon real property) imposed upon a limited geographic benefit district* for district purposes can be so imposed at a rate equally applicable to all taxpayers and users of district facilities without any regard to the varying degrees of service benefits received by district users and taxpayers, and does a complaint alleging such to be a violation of the 14th Amendment state a cause of action?

2. Whether or not the same special tax can be arbitrarily imposed equally across the same geographical benefit district without any regard to the vast and recognized economic, demographic and geographic differences within the district and the resulting disparate effect of the tax upon district taxpayers because of these differences, and does a complaint alleging such to be a violation of the 14th Amendment state a cause of action?

Parties Below.

The caption of the case contains the names of all parties to the proceeding in the Court whose judgment is sought to be reviewed.

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*The 12 County Metropolitan Commuter Transportation District (MCTD) consisting of, and surrounding New York City including the Counties of Orange, Suffolk, Nassau, Rockland, Putnam, Dutchess, Westchester, The Bronx, New York, Kings, Queens and Richmond, created by Section 1262 of the Public Authorities Laws of New York.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

LOUIS HEIMBACH, Individually and as County Executive of Orange County, on behalf of all persons in Orange County liable for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York; and PETER F. COHALAN, Individually and as County Executive of Suffolk County, on behalf of all persons in Suffolk County liable, for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York,

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Jurisdictional Statement on Appeal for the Court of Appeals of the State of New York.

Opinions Below.

The opinion of the Supreme Court of the State of New York granting summary judgment in favor of the plaintiffs in this case is reported at 113 Misc. 2d 189, 449 N.Y.S. 2d 559.

The opinion of the Appellate Division for the Second Department of the Supreme Court of the State of New York reversing the aforementioned decision is reported at 89 A.D. 2d 138, 454 N.Y.S. 2d 993.

The opinion of the New York State Court of Appeals affirming the decision of the Appellate Division is reported at N.Y. 2d , N.Y.S. 2d .

All of these opinions are reproduced in full in the Appendix at pages 7a-12a, 13a-31a and 32a-33a, respectively.

Jurisdiction.

The nature of this proceeding is one seeking to declare the provisions of Chapter 485 of the Laws of the State of New York of 1981 as being unconstitutional and repugnant to the provisions of the 14th Amendment of the United States Constitution in their application to the affected taxpayers. The proceeding was brought under the provisions of 42 U.S.C. 1983 seeking such a declaration by virtue of the allegations in the first and second causes of action of the complaint. The date of entry of the order of the Court of Appeals of the State of New York which is

sought to be reviewed was June 16, 1983. The date the Notice of Appeal was filed was September 1st, 1983. Said filing took place in the Court of Appeals of the State of New York. The appellate jurisdiction of this court is invoked under the provisions of 28 U.S.C. 1257(2) in that the validity of the provisions of Chapter 485 have been drawn into question as being repugnant to the United States Constitution and when faced with such question the New York State Court of Appeals held the same to be valid.

Constitutional and Statutory Provisions.

United States Constitution, Amend. XIV; Due Process and Equal Protection Clauses.

(Reproduced at page 1a of the Appendix.)

Chapter 485 of the Laws of New York of 1981.

(Reproduced at pages 1a-6a of the Appendix.)

Statement of the Case.

The two individual plaintiffs are residents of Orange Conty and Suffolk County (N. Y.) respectively.* They are liable for the payment of sales and compensating use taxes under the provisions of Article 28 of the Tax Law of the State of New York including the ¼ of 1% sales and compensating use tax imposed by the New York State Legislature upon the 12 County Metropolitan Commuter Transportation District (MCTD) by virtue of Chapter 485 of the Laws of New York of 1981.

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*Louis Heimbach is also the County Executive of Orange County and Peter F. Cohalan the County Executive of Suffolk County.

The first and second causes of action* in the complaint before the court below challenged the constitutionality of the aforementioned ¼% sales and compensating use tax stating the same to be violative of the provisions of the 14th Amendment of the United States Constitution.

The essence of the complaint placed before the New York Courts in these causes of action is that the special tax imposed by Chapter 485 has a disparate effect upon the various economies of the 12 County Metropolitan Transportation District and, that that disparate effect was not created with a legitimate distinction in mind between the 12 Counties in relation to the vast differences between those Counties in their economic, geographic and demographic bases and was imposed arbitrarily simply because of the existence of the district alone. Also the allegations of these two causes of action of the complaint assert of a failure of the taxing agencies (the New York State Legislature) to measure and take into consideration the disparate benefit received by the taxpayer and users within this benefit district and in so doing violated the provisions of the 14th Amendment of the United States Constitution.

The complaint was first placed before the Supreme Court of the State of New York by service of the same on the defendants on September 26, 1981. Upon cross-motions for summary judgment placed before that court, Acting Supreme Court Justice Irving Green granted judgment to the plaintiffs based on the third cause of action in the complaint alleging certain procedural deficiencies surrounding the enactment of Chapter 485. He declared Chapter 485 never to have become law. The issues raised

*The first cause of action is brought on behalf of plaintiff, Louis Heimbach and the second on behalf of plaintiff, Peter Cohalan and are indentical in the substance of their allegations.

by the third cause of action are not before this court on this appeal. Judge Green specifically did not rule upon the constitutional questions presented in the first and second causes of action. His decision is dated March 17th, 1982 and is reported at 113 Misc. 2d 189.

The defendants appealed to the Appellate Division of the Supreme Court of the State of New York. That court reversed the decision of Judge Green. Its opinion dated October 18, 1982 is reported at 89 A.D. 2d 138. The Appellate Division reversed Judge Green on the procedural issues raised in the third cause of action and granted the defendants' cross-motion for summary judgment on the federal questions contained in the first two causes of action stating that an unevenness in the application of a tax does not form the basis of a successful 14th Amendment attack upon the tax. That court found that someone within Orange County and Suffolk County benefited from the tax imposed and thus there was a sufficient constitutional predicate for the imposition of the tax.

Plaintiffs appealed to the New York State Court of Appeals which rendered its decision on June 16, 1983 now reported at N.Y. 2d , which upheld the decision of the Appellate Division both on the procedural issue and the federal issue. That Court cited its decision in *Long Island Lighting Co. v. State Tax Commission,* 45 N.Y.2d 529, to the effect that even a flagrant unevenness in the application of a tax does not give rise to an attack under the 14th Amendment if there is some entity that benefits by reason of the tax which that court, despite the recognized disparity between the component parts of the district, found to be the case. The Court of Appeals did not address the issue of special benefit taxation and the constitutional constraints upon such even though it was briefed to it.

The Judgment of New York State Court of Appeals was entered on June 16, 1983.

This appeal followed.

Reasons Why the Questions Presented are so Substantial as to Require Plenary Consideration.

The so-called "¼% MTA sales tax"* has, at this writing, generated approximately $375,000,000 in revenue.

It is a special tax imposed upon a singularly significant benefit district encompassing and surrounding New York City. It has been imposed with utterly no regard to the diverse economic, geographic and demographic characteristics of the underlying district or the benefits received by district taxpayers and users from the diverse service maintained within the district (the operation of several suburban commuter rail lines around New York City and the operation of the New York City and Staten Island subway and surface [bus] transit systems, carrying millions of people each day). The result is that those within the district who receive little benefit from the services, pay an inordinate and disproportionate tax burden under Chapter 485 far in excess of their cost/benefit ratio.

There is need for this Court to determine whether or not the constitutional protections surrounding the imposition of a special assessment or special tax** apply to sales and

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*Imposed by Chapter 485 of the Laws of New York of 1981 upon sales and uses in the MCTD for Metropolitan Transportation Authority (N.Y.) purposes.

**See discussion in *Village of Norwood v. Baker*, 172 U.S. 269, and 70 Am.Jur.2d "Special or Local Assessments," Sections 10 and 22.

compensating uses within a benefit district in the same manner as they do to the more recognizable traditional imposition of such a levy upon real property within the district. This is an issue never decided by this court. There is also need to determine whether or not the vast volume of revenue that has been and will be generated by this special tax in this singularly important benefit district in the United States has been improperly imposed upon over 20 million taxpayers and users utilizing the most important commuter and inter-city transportation system in the world.

I.

While special taxes or assessments have historically been associated with exactions from real property (see 20 Am. Jur.2d, Special or Local Assessments, Sec. 1) and while at least one court has been stated that such are limited to levies upon real property (*Northwest Mutual Life Insurance Company v. State Board of Equalization and Assessment,* 166 P.2d 917), historical analysis of the theory underlying special taxes or assessments does not lead to this blanket conclusion. The theory of special taxation is one of an exactment of revenue from "property" necessary to pay for a needed public improvement or service, levied with reference to the special benefit derived by the "property" within the district from the construction of the improvement or maintenance of the service. The benefit derived is considered at least full compensation for the expense incurred with the result that the taxpayer suffers no pecuniary loss by reason of the special tax. *Illinois Central RR. v. City of Decatur,* 147 U.S. 190; *Village of Norwood v. Baker,* 172 U.S. 269. As was stated by Mr. Justice Harlan in the *Norwood* case, "the owners (taxpayers) do not, in fact, pay anything in excess of what they recover by reason of the improvement (or service)."

The inclusion within this theory, of an exaction of funds from the sale or use of personalty within the district instead of an exaction based solely on the value of real property in the district, does not dilute the theory.

A special tax or assessment can result as much from the employment of a sales tax imposed upon a benefit district as from the more traditional and recognizable, but administratively difficult and somewhat anachronistic levy on real property within such a district.

A question may be asked (and will be answered): What "property" is monetarily enhanced by the improvement or service, if not real property? The answer is: the ability to conduct a profitable sale or maintain a profitable use; the ability to do business. The value of the business will be enhanced and, if you will, the "economy" of the district composed of all of the businesses within that district will be enhanced. The conduct of business within the district beneficially affected by the improvement or service is as much a "property" capable of being increased in value by reason of the improvement or service as is the ownership of realty.

Following then, if the special assessment or tax takes the form of a sales tax or a compensating use tax benefiting affected businesses within the district then, it is submitted, the traditional constitutional rules applicable to such levies must apply. This court has never been faced with this issue. A special assessment cannot be imposed upon a benefit district arbitrarily without some relationship to the benefit received by the affected property within the district. While mathematical precision in computing a benefit ratio is impossible and not a task for the courts, it is wholly improper to impose a special levy in the form of

a sales tax at a uniform rate across a vastly different and diverse benefit district such as the MCTD, without *any* consideration for the overall differences within the district in terms of both the area affected and the benefits received.

Indeed, a comprehensive study* released by the MTA addressing this very question shortly after the Court of Appeals heard arguments in this case, discloses that in the cost year of 1983 the taxpayer in Orange County with regard to the operation of the New York City Subway System, the Staten Island Rapid Transit System and the Surface or Bus lines within the City of New York was charged the sum of 1.9 million dollars, allocated against the revenues received from the subject sales tax, but yet only contributes $700,000 towards the overall gross operating expenses of those systems within the district. Similarly this same study shows that the user or taxpayer in Orange County on an allocated basis received only $.31 for every $1.00 of revenue derived (from all sources) for all MTA services. In the same study, it is revealed that the subject sales tax during the calendar year 1983 accounted for 2.5 million dollars in revenue for Orange County users towards an overall gross operating expense allocated to Orange County users of 4 million dollars, a 62% factor which is far in excess of the same ratio for most other participating counties.

The differences between rural environs of Orange and Eastern Suffolk County and the central core of New York City are obvious and generally recognized by the courts that have dealt with this question?** In short, this special

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*"Discussion of Service Benefits and Contributions for the 12 Counties of the New York Metropolitan Region," prepared by the Staff of the Metropolitan Transportation Deputy Executive Director for Management and Budget, dated June 13, 1983, reproduced in full at pages 38a through 54a of the appendix.

**See *Heimbach v. State*, 89 AD 2d 13[illegible] at 151.

tax or levy is blind to the nature of and the component parts of the district upon which it is imposed. It results in a severe inequity in the tax imposed service rendered benefit ratio insofar as Orange County and Suffolk County users are concerned. On the face of it, there is a violation of the 14th Amendment provisions of the United States Constitution and the burden of pleading such a violation has been met by the plaintiffs. A complaint alleging the erroneous and disparate nature of this special levy should not be dismissed for failing to state a cause of action.

II.

The imposition of this sales tax on this benefit district varying widely within its boundaries, has the effect of creating distinctions in assessments based solely on a geographical predicate. While this tax is facially equal on its surface, upon its application to the underlying district varying greatly as it does in its economic, geograhic and demographic characteristics, it is disparate in its effect upon the taxpayers and users of the district.

While it is true that a tax may be imposed solely on a geographical basis, it is also true that when so imposed, there must be some showing that the result in classification and disparate taxation, is neither capricious nor arbitrary but rests upon some reasonable consideration of difference of policy. *State of Board Tax Commissioners of Indiana v. Jackson,* 283 U.S. 527. The complaint here is that the blanket imposition of the subject ¼ of 1% sales and use tax across a widely divergent 12 County District without *any* regard to the diverse characteristics of these counties or the divergent policy exercised by the taxing agent towards these counties is violative of the 14th Amendment. The imposition of this special tax which has,

in its operation, the effect of creating different tax-benefit ratios within the same benefit district, is wholly without some reasonable consideration of the differences between the 12 Counties within the district and the policy of the MTA concerning these Counties. A complaint alleging this disparate effect of an otherwise facially equal tax, in effect, imposed upon a geographical basis only as being violative of the 14th Amendment of the United States Constitution states a cause of action and should not have been dismissed by the court below as failing to do so.

Conclusion.

The special tax imposed by Chapter 485 upon the MCTD benefit district is blind to the recognizable and substantial differences in that district and the great varying degrees of service rendered to the various taxpayers and users within the district. The constitutional protections surrounding the imposition of a special tax upon a benefit district should apply to the tax of Chapter 485, notwithstanding it is a sales and compensating use tax. No such protections were even attempted upon the enactment of Chapter 485. The tax imposed by Chapter 485 in its application creates varying cost/benefit ratios and assessments based solely on geographical reasons alone to which the New York State Legislature gave no consideration before the enactment of the tax. The 14th Amendment requires such a consideration to be given before the imposition of a tax based, in effect, on geographical considerations only.

A complaint stating the aforementioned to be a violation of the protections granted to the plaintiffs under the Constitution of the United States states a legitimate cause of action against a tax that has generated vast sums of

money from the most important commercial district within the United States, if not the world. This court should recognize the error of the New York State Court of Appeals and take to itself full plenary consideration of the substantial questions raised by this appeal.

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Dated: September 12, 1983

APPENDIX.

The 14th Amendment to the United States Constitution.

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 485 Laws of 1981.

AN ACT to amend the tax law, in relation to the imposition of an additional sales and compensating use tax within the metropolitan commuter transportation district and making an appropriation for the support of mass transit.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The tax law is amended by adding a new section eleven hundred nine to read as follows:

§1109. Sales and compensating use taxes for the metropolitan commuter transportation district. (a) General. In addition to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article, there is hereby imposed within the territorial limits of the metropolitan commuter transportation district created and established pursuant to section twelve hundred sixty-two of the public authorities law, and there shall be paid,

additional taxes, at the rate of one-quarter of one percent, which shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article. Such sections and the other sections of this article, including the definition and exemption provisions, shall apply for purposes of the taxes imposed by this section in the same manner and with the same force and effect as if the language of those sections had been incorporated in full into this section and had expressly referred to the taxes imposed by this section.

(b) Transitional provisions. The transitional provisions contained in subdivisions (a), (b), (c) and (d) of section eleven hundred six of this article shall apply to the taxes imposed by this section, except that all references in such subdivisions (a), (b), (c) and (d) to August first, nineteen hundred sixty-five shall be read as referring to September first, nineteen hundred eighty-one, all references in such subdivisions (a) to April first, nineteen hundred sixty-five shall be read as referring to May first, nineteen hundred eighty-one, and the reference in such subdivision (b) to July thirty-first, nineteen hundred sixty-fve shall be read as referring to August thirty-first, nineteen hundred eighty-one.

(c) Deliveries outside the district; deliveries within the district of property sold or serviced elsewhere. Where a sale of tangible personal property or services, including an agreement therefor, is made in the district in which the taxes imposed by this section apply, but the property sold or the property upon which the services were performed is or will be delivered to the purchaser elsewhere, such sale will not be subject to taxes imposed by this section. However, if delivery occurs or will occur in the district where the tax imposed by this section applies, a vendor

will be required to collect from the purchaser the sales or compensating use taxes imposed by this section. For the purposes of this section, delivery shall be deemed to include transfer of possession to the purchaser and the receiving of the property by the purchaser. The provisions of section twelve hundred fourteen of this chapter shall be applicable to this section, but any reference in that section to a local sales or use tax imposed by a city, county or school distict shall mean the additional taxes imposed by this section.

(d) Deposit and disposition of revenue. (1) The taxes, interest and penalties imposed pursuant to this section and received by the tax commission, after deducting the amount which the commissioner of taxation and finance shall determine to be necessary for reasonable costs of the tax commission in administering, collecting and distributing such taxes, shall be deposited daily with such responsible banks, banking houses or trust companies, as may be designated by the comptroller, to the credit of the comptroller. Such an amount may be established in one or more of such depositories. Such deposits shall be kept separate and apart from all other money in the possession of the comptroller. The comptroller shall require adequate security from all such depositories. Of the total revenue collected or received under this section, the comptroller shall retain in his hands such amount as the commissioner of taxation and finance may determine to be necessary for refunds under this section.

(2) On or before the twelfth day of each month, after reserving such amount for such refunds and such costs, the commissioner of taxation and finance shall certify to the comptroller the amount of all revenues so received during the prior month as a result of the taxes, interest and

penalties so imposed and in addition on or before the last day of June the commissioner shall certify the amount of such revenues received during and including the first twenty-five days of June. The amount of revenues so certified shall be deposited by the comptroller in the mass transportation operating assistance fund established by section eighty-eight-a of the state finance law to the credit of the metropolitan mass transportation operating assistance account herein.

§2. Section eleven hundred forty-eight of such law, as added by chapter sixty-nine of the laws of nineteen hundred seventy-eight, is amended to read as follows:

§1148. Deposit and disposition of revenue. All taxes, interest and penalties collected or received by the tax commission under this article shall be deposited and disposed of pursuant to the provisions of section one hundred seventy-one-a of this chapter; provided however, the comptroller shall on or before the twelfth day of each month, pay all taxes, interest and penalties collected under this article and remaining to his credit in such banks, banking houses or trust companies at the close of business on the last day of the preceding month, into the general fund of the state treasury, except as otherwise provided in section ninety-two-d of the state finance law and section eleven hundred nine of this article.

§3. The sum of eighty-six million seven hundred thousand dollars ($86,700,000), or so much thereof as may be available and necessary, is hereby appropriated from the metropolitan mass transportation operating assistance account of the mass transportation operating assistance fund to the department of transportation for payment of mass transportation operating assistance in accordance with the

following schedule. Whenever the commissioner of transportation is notified by the comptroller that the amount of revenues available for payments from the account is less than the total amount of money for which the public mass transportation systems are eligible pursuant to the provisions of section eighty-eight-a of the state finance law, the commissioner shall establish a maximum payment limit which is proportionately lower than the amounts set forth in the following schedule. . . 86,700,000

SCHEDULE

To the metropolitan transportation authority for the operating expenses of the New York city transit authority, the Manhattan and Bronx surface transportation operating authority, and the Staten Island rapid transit operating authority. 57,910,000

To the metropolitan transportation authority for the operating expenses incurred after January first, nineteen hundred eighty-one of the Long Island railroad company and the consolidated rail corporation (limited in such cases to those operating expenses of such corporation which are properly chargeable, directly or indirectly to the metropolitan transportation authority pursuant to joint service agreements in effect covering such corporation's Harlem, Hudson, Port Jervis and New Haven commuter railroad services). 18,740,000

To the city of New York for the operating expenses of the Staten Island Ferry notwithstanding any other provisions of law. 1,510,000

To all other public transportation systems serving within the metropolitan transportation commuter district as defined in section twelve hundred sixty-two of the public authorities law eligible to receive operating assistance under the provisions of section eighteen-b of the

transportation law for the operating expenses thereof in accordance with a service and usage formula to be established by such commissioner with the approval of the director of the budget. In establishing a service and usage formula for the mass transportation operating assistance element of the schedule, the commissioner of transportation may combine and/or take into consideration those formulas used to distribute mass transportation operating assistance payments authorized by separate appropriations in order to facilitate program administration and to ensure an orderly distribution of such funds.... 8,540,000

Total of Schedule..... $68,700,000

The amount herein appropriated shall be available for payments during the period April first, nineteen hundred eighty-one through June thirtieth, nineteen hundred eighty-two. Notwithstanding the provisions of any general or special law, no part of any such appropriation shall be available for the purposes designated until a certificate of approval of availability shall have been issued by the director of the budget and a copy of such certificate filed with the state comptroller, the chairman of the senate finance committee and the chairman of the assembly ways and means committee. Such certification may be amended from time to time subject to the approval of the director of the budget and a copy of each such amendment shall be filed with the state comptroller, the chairman of the senate finance committee and the chairman of the assembly ways and means committee.

§4. This act shall take effect September first, nineteen hundred eighty-one.

Opinions in the State Court.

NEW YORK SUPREME COURT

COUNTY OF ORANGE.

IN THE MATTER

OF

LOUIS HEIMBACH, Individually and as County Executive of Orange County, on behalf of all persons in Orange County liable for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York; and PETER F. COHALAN, Individually and as County Executive of Suffolk County, on behalf of all persons in Suffolk County liable for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York,

Plaintiffs,

against

THE STATE OF NEW YORK and JAMES H. TULLY, Jr., as the Commissioner of the New York State Tax Commission,

Defendants.

Index No. 5660/1981

Motion Cal. #5

Motion Date: Feb. 22/82, Mar. 8/82

GREEN, J.

In a class action brought pursuant to CPLR, Art. 9, for a declaratory judgment (CPLR 3001), the plaintiffs now move for summary judgment in their favor upon the third cause of action set forth in their verified complaint, to wit, that Chapter 485 of the Laws of 1981 of the State of New York was not a lawfully enacted law, and consequently, is without effect upon the plaintiffs. The first two causes of action set forth in such complaint seek to raise issues with respect to the constitutionality of said law.

Chapter 485 of the Laws of 1981 increases by one-quarter of one per cent the sales and compensating use tax of New York State within the Metropolitan Commuter Transportation District, a twelve county area that is served by the Metropolitan Transportation Authority (MTA) and that includes Orange County and Suffolk County.

The defendants cross-move the Court for summary judgment dismissing the verified complaint in its entirety on the grounds that: (a) plaintiffs have failed to state a cause of action, and (b) the Court lacks jurisdiction over the subject matter of the third cause of action in the verified complaint.

It appears without dispute from all of the papers submitted upon these motions that Chapter 485 of the Laws of 1981 was passed by the State Senate upon a "fast" roll call which resulted in the Senate Journal entry of such vote (Page 50 for July 8, 1981) of 31 Ayes and 26 Nays with three excused senators. The New York State Senate consists of sixty senators so that said Chapter 485 was passed by a bare majority of one vote as appears in the Journal and is not disputed on these motions.

It further appears without dispute that such bare one vote majority came about by recording as an "AYE" vote

Senator Howard C. Nolan, Jr., the State Senator representing the 42nd Senatorial District of the State of New York, although such Senator was not present in the Senate Chamber at the time the vote was taken but was, actually, hospitalized for surgery. In his affidavit in support of the motion, Senator Nolan avers that he checked into the Senate Chamber on the morning of July 8, 1981, and later in the day checked into the hospital; and that, in accordance with custom, he informed the Minority Leader, Senator Ohrenstein, of his entering the hospital the evening of July 8, 1981, for surgery. Senator Nolan further states, in his supporting affidavit upon the motion, that he would have voted *against* all of the proposed taxing measures (including Chapter 485) if he were present.

The recordation of Senator Nolan's vote, with respect to Chapter 485, as "AYE" came about, the defendants allege, as the result of the Senate rules and customs in the New York State Senate that the "presence" of any Senator is established by his physical entry into the Senate Chamber at some point during a session day and that under a "fast" roll call vote on a bill any Senator who has had his "presence" during that session day designated by the Clerk of the Senate, is deemed to be voted in the affirmative on any "fast" roll call vote even if the Senator is outside the Senate Chamber or elsewhere when the vote is taken. To vote in the negative on a "fast" roll call vote, under the rules and custom of the Senate, it is claimed, the Senator must be in the Chamber and indicate his negative vote by a show of his hand.

Chapter 485 was enacted by means of a "fast" roll call vote. The "presence" of Senator Nolan was established upon his entry into the Senate Chamber during the morning of July 8, 1981. His vote was recorded as affirmative solely by reason of the claimed rules and custom of the Senate.

The rules of the Senate, at the time the subject Chapter 485 was voted upon, so far as here pertinent and as defendants assert for the basis of their recordation of Senator Nolan's vote as "AYE", provide:

RULE VIII, SECTION 6

> "Final Passage. The question on the final passage of every bill shall be taken immediately after the third reading and without debate. On the final passage of every bill a roll call shall be taken by the Secretary calling the names of five Senators, two of whom shall be the Temporary President and the Minority Leader, provided however, that each Senator's name shall be called if requested by five Senators. Each roll call shall be entered on the journal. . . .When a bill does not receive the number of votes required by the Constitution to pass it, it shall be declared lost, except. . ."

It shall be noted that the foregoing Senate rule makes no provision for "fast" or "slow" roll call *voting*. Nor does such rule provide any procedure for the recordation of the vote of any Senator, "AYE" or "NAY", upon a proposed bill following a "roll call".

In any event, it is settled that judicial inquiry is appropriate and necessary when adherence to the mandates of the Constitution are involved in legislative enactments; and in such inquiry the field of inquiry is enlarged to include consideration of extrinsic evidence. The mandate of the Constitution (Art. III, Sec. 14) not only permits, it requires an examination into the procedure followed in the consideration and passage of the bill. *Franklin National Bank v. Clark*, 26 Misc. 2d 724. While in general the courts will not interfere with the internal procedural

aspects of the legislative process, judicial review may be undertaken to determine whether the Legislature has complied with constititutional prescriptions as to legislative procedures, *Board of Education v. City of New York*, 41 N Y 2d 535, 538.

Article 3, Section 14 of the State Constitution provides in unambiguous language, so far as here relevant, as follows:

> ". . .; nor shall any bill be passed or become a law, except by the assent of a majority of the members elected to each branch of the legislature; . . ." (Emphasis added).

As a general rule, when interpreting a constitutional provision the language should be accorded its plain meaning and attribute to it the meaning manifest in the language used. *People v. Carroll*, 3 N. Y. 2d 686; *Anderson v. Regan*, 80 A D 2d 49. Reading the foregoing provision of the Constitution, critical to the determination of these motions, the interpretation of the word, "assent", poses the ultimate issue on the question of whether or not Chapter 485 may become a law. The plain meaning of "assent" may be found in Webster's New Collegiate Dictionary as: "to agree to something esp. after thoughtful consideration". In the sense of the law, assent is a matter of overt acts. *Matter of Triboro Coach Corp. v. State Labor Relations Board*, 261 App. Div. 636, 638; Black's Law Dictionary, Rev. Fourth Ed.

Long ago (1853), the Court of Appeals in *People ex rel. Scott v. Supervisors of Chenango*, 8 N. Y. 317, 328, instructed that the constitutional requirement of a certain number to pass a bill presents a defect of power in the legislature if the requisite number be not present and voting.

It need hardly be emphasized that the addition, in 1894, to the Constitution of the phrase, "or become a law", to Article 3, Section 14, imposed stated controls on legislative action as to the form and deliberation of bills so as to prevent, *inter alia*, hasty legislation and secure more publicity than had been required before. Care was taken to provide for emergencies by a certificate of necessity from the Governor, which authorizes the members elected to each branch of the Legislature is not directory but mandatory. *Franklin National Bank v. Clark, supra*, pp. 734, 735.

The Court finds that the procedure by which Chapter 485 of the Laws of 1981 is claimed to have been passed under the particular undisputed facts in this case contravenes the mandatory proscription of the Constitution and is repugnant to it. The assent of Senator Nolan, as recorded in the Senate Journal, on a "fast" roll call vote is a fiction rooted in a custom which is not expressed in the Senate rules obtaining at the relevant time, but more importantly finds no sanction in light of the constitutional mandate.

Accordingly, the Court grants summary judgment in favor of the plaintiff upon the third cause of action set forth in the verified complaint herein declaring that Chapter 485 of the Laws of 1981 of the State of New York has failed to become a law for lack of a majority vote of the members of the Senate elected to such branch of the legislature.

In all other respects, the motion and cross-motion are denied as moot. The Court need not and does not reach the further questions as to the constitutionality of Chapter 485 sought to be raised herein.

Settle Judgment.

Dated: March 17th, 1982

S/Hon. IRVING A. GREEN
Acting Supreme Court Justice

SUPREME COURT,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

TITONE, J.P., GIBBONS, WEINSTEIN, GULOTTA and THOMPSON, JJ.

LOUIS HEIMBACH, individually, and as County Executive of Orange County, etc., *et al.*,

Respondents-Appellants,

against

THE STATE OF NEW YORK *et al.*,

Appellants-Respondents.

WARREN M. ANDERSON, as Temporary President and Majority Leader of the New York State Senate,

Intervenor-Appellant-Respondent.

Appeals by defendants State of New York and James H. Tully, State Tax Commissioner, and by defendant-intervenor Warren M. Anderson, from a judgment of the Supreme Court at Special Term (Irving A. Green, Jr.), dated March 24, 1982 and entered in Orange County, which, denied their application for class action certification.

Per curiam:

Chapter 485 of the Laws of 1981[1] (Senate Bill 1905); (Assembly Bill 9059) increases by one-quarter of one percent the sales and compensating use tax of the State within the Metropolitan Commuter Transportation District (MCTD), a 12-county area served by the Metropolitan Transportation Authority (MTA). Orange and Suffolk Counties are included in the MCTD (Public Authorities Law, §1262).

As recorded in the Journal of the Senate, Senate Bill 1905 was passed by that body with the minimum number[2] of affirmative votes required by the State Constitution (NY Const, art III, §14). The voting procedure employed is known as the "fast" roll call, and one of the affirmative votes recorded is that of Senator Howard Nolan. It is not disputed that when the vote was taken, Senator Nolan was a patient in the hospital being prepared for elective surgery. The bill was certified as passed on July 8, 1981 by the Speaker of the Assembly and the Acting President of the Senate. It was approved by the Governor on July 11, 1981 and became effective on September 1, 1981.

In this action by the county executives of Orange and Suffolk Counties against the State of New York and James H. Tully, Jr., as the Commissioner of the New York State Tax Commission, the third cause of action seeks a judgment declaring that chapter 485 of the Laws of 1981 is not a duly enacted law of the State of New York. The plaintiffs also seek a declaration that the tax scheme created by chapter 495, in its operation and effect, violate[s] the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution" with

[1]Chapter 485 of the Laws of 1981 is codified as Tax Law §1109.

[2]31 of the 60 members of the State Senate.

respect to both Orange County (first cause of action) and Suffolk County (second cause of action).

Plaintiffs moved for summary judgment on the third cause of action and defendants cross-moved for summary judgment dismissing the complaint in its entirety, *inter alia*, for failure to state a cause of action. Special Term held that on the facts in this case, the assent of Senator Nolan on a "fast" roll call contravened the mandatory proscription of the State Constitution with respect to the passage of a bill, granted the plaintiffs' motion and declared that the said chapter of the Laws of 1981 had not become a law. The defendants' cross motion was denied as moot, and Special Term did not reach the other constitutional issues sought to be raised. Defendants now appeal from the judgment at Special Term and plaintiffs appeal from an order which denied their application for class action certification. This court has granted the application of Warren M. Anderson, as Temporary President and Majority Leader of the Senate, for leave to intervene as a defendant-appellant.

The judgment should be reversed. On the facts as set forth in this record, chapter 485 of the Laws of 1981 was validly enacted into law. We also reject the other challenges raised by the plaintiffs to the validity of the chapter. In light of this determination, plaintiffs' appeal from the order denying class certification is academic.

Initially, we observe that while "in general the courts will not interfere with the internal procedural aspects of the legislative process, judicial review may be undertaken to determine whether the Legislature has complied with constitutional prescriptions as to legislative procedures (*Norwick v. Rockefeller*, 33 NY2d 537; *Matter of Schneider v. Rockefeller*, 31 NY2d 420; *Finger Lakes Racing Assn. v. New York State Off-Track Pari-Mutuel Betting Comm.*, 30 NY2d 207, 219-220; *People v. Devlin*, 33

NY 269; *Franklin Nat. Bank of Long Is. v. Clark*, 26 Misc 2d 724)." (*Matter of Board of Educ. of City of New York*, 41 NY2d 535, 538.)

Howard Nolan, who has been a member of the State Senate since January 1, 1975, was scheduled to undergo elective surgery on July 9, 1981. On the morning of July 8, 1981, he entered the Senate Chamber and had himself designated as present by the Clerk of the Senate. Later in the day, he left the Senate, without informing the Clerk, first going home and then to the hospital. At some time during that day, Assembly Bill 9059, which provides for a quarter of one percent increase in the sales and compensating use tax in the MCTD, was passed by the Assembly and forwarded to the Senate as part of a Package of tax bills designed to improve transportation in the district. During the early morning hours of July 9, while Senator Nolan was in the hospital, a vote was taken on Assembly Bill 9059 (Senate Bill 1905) by means of the "fast" roll call. According to the entry in the Senate Journal, the Senate voted 31 to 26 in favor of the bill, with three Senators "excused". The vote of Senator Nolan is included among the 31 "Aye" votes, which is the minimum number of votes required for passage.

Our State Constitution requires that no bill "shall * * * be passed or become a law, except by the assent of a majority of the members elected to each branch of the legislature" (NY Const, art III, §14), but the Constitution has prescribed no method of determining the assent of a majority (cf. *United States v. Ballin*, 144 US 1, 6). Section 9 of article III of the Constitution vests in each house of the Legislature the power to determine the rules of its own proceedings. In the exercise of that power, the Senate has adopted Rules VIII (§6) and IX (§1) which provides:

Senate Rule VIII, Passage of bills:

"6. Final Passage. The question on the final passage of every bill shall be taken immediately after the third reading and without debate. On the final passage of every bill, a roll call shall be taken by the Secretary calling the names of five Senators, two of whom shall be the Temporary President and the Minority Leader, provided however, that each Senator's name shall be called if requested by five Senators. Each roll call shall be entered on the journal. Such roll calls shall be available for public inspection upon request in the office of the Journal Clerk. When a bill does not receive the number of votes required by the Constitution to pass it, it shall be declared lost, except in cases provided for by subdivision d of section two of Rule 9 hereof."

Senate Rule IX, Senators:

"Section 1. Attendance and Vote.

"a. Every Senator shall be present within the Senate Chamber during the sessions of the Senate, unless duly excused or necessarily prevented, and shall vote on each question stated from the Chair unless excused by the Senate, or unless he has a direct personal or pecuniary interest in the event of such question. If any Senator refuses to vote, unless he be excused by the Senate, or unless he be interested, such refusal shall be deemed a contempt."

The Senate voting procedures are described by Senate Minority Leader Manfred Ohrenstein as follows:

"4. To vote for the passage of a bill a senator must be present on the day the particular vote is taken. Presence is established under the senate rules and customs by a senator's physical entry into the chamber at some point during a session day. However, * * * a senator's *presence in fact* as opposed to his above described *designated* presence is not necessary for his vote to be cast, in most cases."

"f. Under the rules of the senate, voting on the final passage of bills may take place under one of two methods—a fast or slow roll call (Rule VIII, §6). On a fast roll call, a vote is taken by calling the names of five senators, including the Temporary President, the Minority Leader and three others usually the first and last two senators on the alphabetically arranged senate roll call list. What is particularly important to note under the fast roll call method of voting is that under a long established senate custom, a senator who has had his presence designated by the clerk of the senate, as described in '4' above, need not be in the chamber to have his or her vote counted in the affirmative. In other words, a senator who has had himself or herself marked present will be deemed to be voted in the affirmative on any particular vote even if in fact he or she is in his or her office or elsewhere at the time the vote occurs. To vote in the negative, however, a senator must be in the chamber and indicate a negative vote by a show of hand."

"6. This practice is not followed a slow roll call. Here, after five senators have stood to request this voting process, each of the sixty senator's *[sic]* names are called, and only those members answering 'aye' or 'nay' to their names are recorded as

having voted. Those members not responding when their names are called are recorded as having not voted on the measure despite the fact that they may have already been designated present for that day's senate session (See Rule 8, Sec. VI) * * *"

"11. Under the rules of the senate a senator who has not had himself designated as present (See paragraph 4 above) is recorded as absent on every roll call vote unless such absence has been excused by the senate. Once a senator is present as described above he or she is voted on each fast roll call vote, present in fact or not, unless excused by the senate (Rule 9, Sec. 1). The normal practice for excusing a senator who has had himself designated as present and then who wants to leave is for that member or another member to rise and request of the senate to excuse him or her from voting on further items, which such excuse is generally accepted by the majority without objection. In the case of excusing someone who has not had himself designated as present, the clerk is generally notified of the requested excused absence by my staff at the end of a session and the senate approves it or not on the following day when it approves the preceeding *[sic]* day's journal."

According to the intervenor, Senator Anderson, 97.9% (1,954 of a total of 1,995) of all bills voted on in 1981 "passed on a fast roll call vote."

Senator Nolan stated in his affidavit in support of plaintiffs' motion for summary judgment on the third cause of action, that "for at least the past seven years while I have been a member of the New York State Senate, it has been the custom, and still is the custom in the Senate on the

Minority side, to arrange for an excused appearance through the office of the Minority Leader, i.e., Senator Manfred Ohrenstein. I have used this procedure on several occasions in the past and have never questioned the same, relying on tradition and custom." In "accordance with custom", he claims that he informed Senator Ohrenstein in person, the previous week, that he was entering the hospital the night of July 8 to undergo elective surgery. After he left the Senate on July 8, he received a telephone call at home from Senator Ohrenstein's Administrative Assistant who informed him that there would be a vote later that evening on the subject package of bills and that his presence was needed because the vote on several of the bills was likely to be close. In Senator Nolan's words:

> "Senator Ohrenstein came to the 'phone and I reminded him of our conversation of the previous week, which he acknowledged and said that he had forgotten about the fact that I was entering the hospital. I also reminded him that I had told him previously that I would not help his cause in any event, as I would have voted against all of the proposed taxing measures if I were present, and would probably speak against some of them, which was obviously a position contrary to that of the Democratic leadership in the Senate. Senator Ohrenstein acknowledged my previous conversation concerning my hospitalization, wished me good luck, and personally assured me that I would be marked 'excused because of being in the hospital' for any votes taken that evening or on the following day."

Senator Ohrenstein responded:

> "The crux of plaintiff's *[sic]* argument however appears to revolve around Senator Nolan's allegations that he attempted to have his designation as 'present' converted to an excused absence by making this request of me by telephone sometime in the evening of July 8, 1981. * * *
> "[F]rom a legal perspective, assuming the accuracy of Senator Nolan's recollection, any request to be excused that he might have made of me does not in any way insure that such designation would be forthcoming. Moreover, there is no legal obligation on my part to even convey his request to the senate, although as matter of senate courtesy and leadership responsibility, any such reasonable request would generally be honored. In other words, I could choose not to ask that a senator be excused in which case if a senator was not able to have himself or herself excused in the manner described above he or she would be considered absent for votes if he or she had not checked in and as voting in the affirmative on fast roll calls if he or she had checked in. * * *
>
> "I acknowledge that Senator Nolan called me on the evening of July 9, 1981 to discuss his pending hospitalization. I have however no recollection whatsoever of any request that he be excused. Moreover, even had this request been made, as alleged, it would have had no effect on the casting of Senator Nolan's votes. The reason for this is that at that time I was under the clear impression that Senator Nolan was absent that day and therefore not voting on any issue. Thus, even if I had

> knowledge of this request it would have only meant to me that he wanted his absence to be considered an excused absence and not that he wanted his status as 'present' to be converted to the status of 'excused absence.' At best, then, my staff would have informed the journal clerk of the request at the end of the session—after the vote complained of had occurred."

Noting that of "the eight bills relating to the MTA six * * * were passed by fast roll call and two * * * by slow roll call", Senator Ohrenstein asserted that "Senator Nolan who was not in the chamber at the time was properly recorded in the affirmative on the six (6) fast roll call votes and as not voting (slash through his name) on the two slow roll calls."

In a supplemental affirmation, Senator Ohrenstein claimed that under the Senate rules, "the challenged roll call accurately reflects the vote on the MTA sales tax", and added;

> "This conclusion is not in any way affected by whether or not Senator Nolan requested that I have him excused. As I stated in my supporting affirmation, despite my inclination to honor such request, I have no legal obligation to do so and even if I were to do so, that would not guarantee that the Senate would accept such request. Moreover * * * even if I had been cognizant of the request, which I was not, and inclined to honor it, given this particular situation, I would have understood such a request not as one asking that a 'present' Senator be excused but that an 'absent' senator have such absence be characterized as 'excused'."

Before Special Term, the plaintiffs admitted that:

> "For purposes of this motion, it will be conceded that for Senators in presence and making up part of the quorum which allows the Senate to proceed in the first place a failure or refusal to vote for whatever reason, including perhaps an abstention will be deemed as a vote in favor of the measure before the Senate. A Senate Rule of custom so provides."

The plaintiffs contended, however, that such was not the case here, since Senator Nolan was not in presence and did not make up part of the quorum which allowed the Senate to act on the bill in the first place.

The Constitution provides that "[a] majority of each house shall constitute a quorum to do business" (NY Const, art III, §9). The Senate rules require every Senator to be "present" and to "vote" (Rule IS, §1). Section 2 of Rule IX pertinently provides:

> §2. Quorum.
>
> "a. A majority of all the Senators elected shall constitute a quorum to do business. In case a less number than a quorum of the Senate shall convene, those present are authorized to send the Sergeant-at-Arms, or any other person, for the absent Senators.
>
> * * *
>
> "f. If at any time during the session of the Senate a question shall be raised by any Senator as to the presence of a quorum, the Presiding Officer shall

forthwith direct the Secretary to call the roll, and shall announce the result, and such proceeding shall be without debate; but no Senator while speaking shall be interrupted by any other Senator raising the question of a lack of a quorum, and the question as to the presence of a quorum shall not be raised oftener than once in every hour unless the lack of a quorum shall be disclosed upon a roll call of the ayes and nays.

"g. Whenever upon a roll call any Senator who is upon the floor of the Senate Chamber refuses to make response when his name is called, it shall be the duty of the Presiding Officer, either upon his own motion or upon the suggestion of any Senator, to request the Senator so remaining silent to respond to his name, and if such Senator fails to do so, the fact of such request and refusal shall be entered in the journal, and such Senator shall be counted as present for the purpose of constituting a quorum."

The rules provide no means for determining when a Senator is "present" or "upon the floor of the Senate Chamber".

The Senate rules generally do not set forth basic parliamentary rules and details. When the Legislature has not adopted rules for a particular subject of purpose, it " 'is governed by the generally accepted rules of parliamentary procedure which flow from general principles of common law ' " (*Matter of Board of Educ. v. City of New York*, 41 NY2d 535, 541, n 3, *supra*, quoting from *Matter of Anderson v. Krupsak*, 40 NY2d 397, 405). Under recognized principles of parliamentary law, where "it appears that a quorum was present at a certain time,

and it does not appear that after that time there was an adjournment, it will be presumed that the quorum continued to be present" (67A CJS, Parliamentary Law, §61, p 619; see Robert's Rules of Order [rev], §39 p 296). By long standing custom, a Senator's presence is established by his actual entry into the Chamber at some point during a session day and having himself marked present by the Clerk of the Senate. Thereafter, his presence is presumed to continue unless he requests that he be excused or informs the Clerk of his departure.

The Senate rules and customs are a reasonable and practical interpretation of the constitutional requirement (cf. *United States v. Ballin,* 144 US 1, 5-6, *supra*); *People ex rel Hatch v. Reardon,* 184 NY 431, 442). As the plaintiffs concede in their brief, under general principles of parliamentary law there is a presumption that Senators present in the Chamber and not recorded as voting are presumed to have voted in the affirmative (see 59 Am Jr 2d, Parliamentary Law, §14, p 24, n 20; 67A CJS, Parliamentary Law, §8, p 620; *Cowan v. New York Calendonian Club,* 46 App Div 288).

Senator Nolan was scheduled to enter the hospital on July 8, 1981 for elective surgery to be performed the next day. On July 8, he had himself designated as "present" by the Clerk of the Senate and left some time later in the afternoon without asking to be excused, as the rules provide, and without informing the Clerk. There is no claim that he was prevented from reporting his departure to the Clerk. As an experienced Senator, he must have known that he would be recorded as voting in the affirmative on every "fast" roll call for the remainder of the July 8 session day.

In their brief, the plaintiffs admit that the "fast" roll call "is an expeditious way of handling the volume of legislation that comes before the Senate." On oral argument of the appeals, the plaintiffs conceded that on these

facts, *so far as the "fast" roll call is concerned,* the recording of Senator Nolan's vote as affirmative was not constitutionally impermissible. Accordingly, the issue of whether a "fast" roll call violates the mandate of the Constitution is not before us and we express no view as to whether the Senate rules and custom as embodied in the use of the "fast" roll call voting procedure conforms to the constitutional prescription (see NY const, art III, §14; see, also, *People ex rel. Scott v. Supervisors of Chenango,* 8 NY 317, 328).

As represented at oral argument by the plaintiffs, the gravamen of their complaint with respect to the third cause of action is that the Senate rules and custom were not observed in that Senator Ohrenstein failed to have Senator Nolan marked "excused because of being in the hospital" for any votes taken on the evening of July 8 or on the following day.

While there is a dispute as to the content of their conversation, it is agreed that Senator Orhenstein had a telephone conversation with Senator Nolan at his home the evening of July 8. For the purposes of this argument, we assume, as Senator Nolan contends, that there has been an unwritten custom in the Senate for a member to arrange for an excused appearance through the office of the Minority Leader, Senator Ohrenstein, that Senator Nolan informed Senator Ohrenstein that he had registered with the Clerk on July 8, and that Senator Ohrenstein agreed to arrange to have him marked "excused" but neglected to do so.

Courts may not "impeach the validity of [a] law, by showing that in its enactment some form or proceeding had not been properly followed or adopted by the legislature, the supreme law maker" (*People v. Devlin,* 33 NY 269, 283). "[R]espect for the basic polity of distribution of powers in our State government, and the exercise

of a proper restraint on the part of the judiciary in responding to invitations to intervene in the internal affairs of the Legislature as a co-ordinate branch of government [are most important]—'it is not the province of the courts to direct the legislature how to do its work'. (*People ex rel. Hatch v. Reardon,* 184 NY 431, 442; cf. *Norwick v. Rockefeller,* 33 NY2d 537.)" (*New York Public Interest Reserach Group v. Steingut,* 40 NY2d 250, 257.) Judicial review of every internal dispute between the members of the Legislature "would frustrate the legislative process and violate" the consitutional principle of separation of powers (*Matter of Anderson v. Krupsak,* 40 NY2d 397, 403, *supra*).

Accordingly, we hold that chapter 485 of the laws of 1981 was validly enacted, the plaintiffs' motion for summary judgment on the third cause of action should be denied, and judgment should be granted defendants on that cause of action.

We turn now to the other constitutional issues raised by the plaintiffs. The crux of the allegations in the first two causes of action pertains to the disproportionate benefits received by the residents of Orange and Suffolk Counties. Thus it is alleged, *inter alia,* that only a small percentage of the residents of these counties utilize MTA facilities; that the primary purpose of the new tax is to fund a deficit in the operation of those MTA facilities which "primarily * * * benefit the occupants, residents and business inhabitants of New York City"; that the ratio of taxes generated in each county within the MCTD will vary because of geographic location, population and economic base, will bear no relation to the services rendered within each county and will result in Orange and Suffolk Counties being "heavily" discriminated against; and that the statutory scheme based on geographical location has no

justification, is arbitrary and capricious and bears no reasonable relation to any legitimate State objective.

The verified answer contains general denials and asserts, *inter alia*, as an affirmative defense that chapter 485 is a constutitional exercise of the taxing authority of the Legislature. The defendants' cross-moved pursuant to CPLR 3212 for summary judgment, *inter alia*, on the ground that the complaint fails to state a cause of action. The supporting papers include an affidavit by David Z. Plavin, Acting Executive Director of the MTA, and a copy of the "comprehensive plan and action program: prepared by the MTA's predecessor, the Metropolitan Commuter Transportation Authority, at the request of former Governor Nelson A. Rockefeller and submitted to him in February, 1968. Mr. Plavin describes in some detail the various transportation services provided by the MTA in Orange and Suffolk Counties. For example, in Orange County the MTA operates the Port Jervis line, for which new cars and locomotives have been acquired, and Stewart Airport, in which MTA has invested in excess of $30 million in capital improvements, and in Suffolk County, the MTA operates the Long Island Railroad to Huntington, recommended improvements to which have been substantially completed, and Republic Airport. Since the acquisition of the two airports, the MTA has operated them and funded their operating deficits, which typically exceed $1 million per year.

In their brief to this court, the plaintiffs urge that the defendants' cross motion, while nominally one for summary judgment pursuant to CPLR 3212, is essentially a motion pursuant to CPLR 3211 (subd [a], par 7) addressed to the sufficiency of the pleadings and that the supporting papers are at best conclusory and inaccurate. The plaintiffs note that neither Stewart nor Republic Airport is included as a recipient of any portion of the funds appropriated by chapter 485.

The plaintiffs, citing *Long Is. Light Co. v. State Tax Comm.* (45 NY2d 529, 535-536), concede that "a legislature having the power to impose taxes has wide latitude in creating districts and zones of taxation and * * * even wider latitude in creating various classifications for purposes of taxation [and] * * * that even a flagrant uneveness *[sic]* in the application of a tax is one of virtually no moment and will not form the basis of a successful attack upon the tax." However, they claim that they are not arguing disparate benefit. They call attention to the allegations in the complaint to the effect that "the taxes imposed by Chapter 485 will be at different ratios amongst all the counties within the MTA transportation district" and are based "only upon a geographic distinction that is capricious and arbitrary, devoid of any reasonable consideration of differences between or policy extending to the several MTA commuter district counties." They also contend that Mr. Plavin's supporting affidavit on the cross motion does not address or deny these allegations.

> "While distinctions based on geographical areas are not, in and of themselves, violative of the Fourteenth Amendment, *Salsburg v. Maryland,* 346 US 545 * * * a state must demonstrate, if it wishes to establish different classes of property based upon different geographical localities—e.g., rural areas as opposed to urban areas—that the classification is neither capricious nor arbitrary but rests upon some reasonable consideration of difference or policy. *State Board of Tax Comm'rs of Indiana v. Jackson,* 283 US 527, 537" (*Weissinger v. Boswell,* 330 F Supp 615, 623-624; see, also *San Antonio Independent School Dist. v. Rodriguez,* 411 US 1, 28 n 66).

Even if we take judicial notice of the economic, geographic and demographic differences between Orange and Suffolk Counties and the other counties within the MCTD, these differences do not demonstrate that the challenged tax scheme does not pass constitutional muster.

The cases on which the plaintiffs rely are inapposite on their facts (*State Bd. of Tax Comrs. v. Jackson*, 283 US 527; *McCarthy v. Jones*, 449 F Supp 480; *Weissinger v. Boswell, supra*). As the defendants correctly state:

> "It is undisputed that there are MTA services and facilities in those counties, utilized by residents of those counties, that are either directly or indirectly subsidized with the revenue raised by the sales tax increase. It is undisputed that there are significant links between these two counties and the rest of the metropolitan area in which the MTA operates * * * it is undisputed that residents of these two counties have long had an opportunity to participate, in MTA's policy deliberations. Public Authorities Law §1263(1) (a)."

That the crux of the plaintiffs' complaint is the disproportionate benefits received by the users of the MTA facilities in Orange and Suffolk Counties is demonstrated by the following statements in the plaintiffs' brief:

> "In short, the Plavin affidavit does not address at all the internal disproportional or disparate effect of the sales tax among the several counties within the MTA commuter district. That and that alone is the central theme of the plaintiffs' complaint."

The remaining grounds on which the validity of chapter 485 is attacked are therefore unavailing. The defendants'

cross motion for summary judgment should be granted and chapter 485 of the Laws of 1981 declared to have been duly enacted into law and to comply with the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

In view of our determination, we need not decide whether the plaintiffs' application for class action status was properly denied. However, if we were to reach that issue, we would affirm for the reasons stated by Special Term.

TITONE, J.P., GIBBONS, WEINSTEIN, GULOTTA and THOMPSON J. J., concur.

Memorandum.

COURT OF APPEALS,

STATE OF NEW YORK.

No. 329

LOUIS HEIMBACH, *et al.*,

Appellants,

v.

THE STATE OF NEW YORK, *et al.*,

Respondents,

WARREN M. ANDERSON, as Temporary President &c. of the New York State Senate,

Intervenor-Respondent.

Memorandum.

The order of the Appellate Division should be affirmed, with costs.

Plaintiffs commenced this action seeking a declaratory judgment that (1) "the roll call vote taken upon proposition designated as A9059 * * * was not correctly registered by the Clerk of the Senate"; and (2) that Chapter 485 of

the Laws of 1981 (Tax Law, §1109) is violative of the Equal Protection Clause of the Fourteenth Amendment.

Section 40 of the Legislative Law provides that the presiding officer's certificate showing the date and requisite votes for passage of a bill shall be "conclusive evidence" that the bill was validly enacted. The statute, therefore, precludes judicial review of the propriety of the subject roll call vote to effect legislative action. In any event, based upon our respect for the basic polity of separation of powers and the proper exercise of judicial restraint, we will not intrude into the wholly internal affairs of the Legislature. (See *Board of Educ. v. City of New York*, 41 NY2d 535, 538; *Matter of Anderson v. Krupsak*, 40 NY2d 397, 403.) "[I]t is not the province of the courts to direct the legislature how to do its work." (*N Y Public Interest Group, Inc. v. Steingut*, 40 NY2d 250, 257.)

Plaintiffs contend in the alternative that if the subject taxing statute were validly enacted, it is nonetheless violative of the Equal Protection Clause of the Fourteenth Amendment because it has a disparate effect on certain regions of the Metropolitan Commuter Transportation District. While it may be true that the statute has resulted in some such disparate treatment, it is undisputed that the residents of Suffolk and Orange Counties use MTA services which are available in those counties and which are subsidized, either directly or indirectly, by revenues generated by the subject tax. As such, the statute has a rational basis and must be upheld. Even a "flagrant unevenness" in application of the tax will not prevent the statute from passing constitutional muster. (*Matter of Long Island Lighting Co. v. State Tax Comm.*, 45 NY2d 529, 535.)

Order affirmed, with costs, in a memorandum. Chief Cooke and Judges Jasen, Jones, Wachtler, Meyer and Simons concur.

Decided June 16, 1983

Court of Appeals Order.

COURT OF APPEALS,

STATE OF NEW YORK.

The Hon. Lawrence H. Cooke, Chief Judge, Presiding.

No. 329

LOUIS HEIMBACH, *et al.*,

Appellants,

v.

THE STATE OF NEW YORK, *et al.*,

Respondents,

WARREN M. ANDERSON, as Temporary President &c. of the New York State Senate,

Intervenor-Respondent.

The appellants in the above entitled appeal appeared by James G. Sweeney, Esq.; the respondents appeared by Hon. Robert Abrams, Attorney General; and Intervenor-Respondent appeared by John F. Haggerty, Esq.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, in a memorandum.

Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer and Simons concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Orange County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

S/ JOSEPH W. BELLACOSA,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 16, 1983.

Notice of Appeal.

IN THE

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF ORANGE.

LOUIS HEIMBACH, Individually and as County Executive of Orange County, on behalf of all persons in Orange County liable for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York; and PETER F. COHALAN, Individually and as County Executive of Suffolk County, on behalf of all persons in Suffolk County liable, for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York,

Appellants,

against

THE STATE OF NEW YORK and JAMES H. TULLY, Jr., as the Commissioner of the New York State Tax Commission,

Appellees,

WARREN M. ANDERSON, as Temporary President and Majority Leader of the New York State Senate,

Intervenor-Appellee.

Index No. 5660/81

Notice is hereby given that Louis Heimbach and Peter F. Cohalan, the Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, affirming the dismissal of the complaint, entered in this action on June 16, 1983.

This appeal is taken pursuant to 28 U.S.C. 1257 (2).

Dated: September 1, 1983

JAMES G. SWEENEY
Counsel for Appellants
Orange County Gov. Center
255-275 Main Street
Goshen, New York 10924

MTA Cost Study.

DISCUSSION of SERVICE BENEFITS and CONTRIBUTIONS for the 12 COUNTIES of the NEW YORK METROPOLITAN REGION

I. OVERVIEW

This paper is an attempt to respond to questions being asked i various counties around the region as to the costs and benefit of transportation services provided by MTA as compared t contributions by each county and/or its residents. These ar difficult questions, at best, even if one can overcome th fundamental issue of whether each aspect of each area o government can be treated to the exact return of every dolla generated in the form of government services and/or benefits.

It is probably inappropriate to single out a particular publi service and a particular revenue stream to study in thi fashion. Public services are financed in competition wit other such services and the choice of a particular revenu stream to match a particular expenditure pattern is accidenta and not necessarily reflective of the particula characteristics of that service. Similarly, redistribution an re-allocation of revenue is a rather fundamental governmenta function which is obscured by viewing so narrow a slice of th totality of public revenues and costs. Finally, this type o analysis ignores the intra-regional interdependencies among th various counties in the region insofar as they affect the basi size and structure of each county's local tax base and insofa as they stimulate the economic activity that takes place i each county.

The counties, however, tend to view each service separately, and do use their local budgets as benchmarks against which t evaluate the service being provided, locally, by an outside entity. As such, MTA is asked,periodically, to ascertain ho much in the way of benefit is produced for each dolla contributed.

II. METHODOLOGY

The analytical process used in producing this paper can be described as follows:

a. Costs and revenues were identified and allocated between the TA on one band and the commuter railroads on the other. (See Appendix A - Definitions). In this process expenditures derive from approved budgets and financial plans on an annualized basis, while revenues reflect those applied to the funding of each of these systems, respectively. (See Table I - Allocation of MTA Operating Expenses and Revenues, 1983).

TABLE 1
Allocation of MTA Operating Expenses and Revenues
Estimated for C.Y.1983
($ in millions)

	TA	Commuter	MTA Total
Gross Operating Expense/Passenger Benefits (excluding Capitalized Projects)	2119	841	2960
External Revenue Sources			
Freight Revenue	-	12	12
Federal Aid	84	24	108
State Appropriations	107	46	153
Non-Allocable Taxes*	77	25	102
Subtotal	268	107	375
Regional Revenue Sources			
Fares	1026	333	1359
Other Revenues	20	65	85
Fare & Service Reimbursement	89	-	89
Connecticut DOT	-	30	30
TBTA Surpluses	117	85	202
Local Station Maintenance	-	56	56
Local Operating Assistance	81	20	101
Police & Car Overhaul Reimbursement	197	-	197
Mortgage Tax	9	13	22
Sales Tax	93	28	121
Gross Receipts Tax	30	9	39
Business Tax	135	95	230
Real Estate Tax	54	-	54
Subtotal	1851	734	2585
Net MTA Surplus/(Deficit)	0	0	0
Fare Box Coverage Ratio			
Gross (Expense vs. Fares)	48.6	39.8	46.1
Net (Unreimbursed Exp.vs.Fares&Fare Reimb.)	58.3	44.3	54.3

*Long Lines, Unitary

Revised 4/28/83

b. These allocated revenues and expenses are then further allocated to each county in the twelve-county region for transit and commuter rail operations, respectively. (See Appendix B - Allocations). Revenues and expenses are compared on a county-by-county basis, for each of these operations, identifying net surpluses or deficits to MTA associated with each county (See Tables II and III).

As described in the appendix, some revenues are allocated to counties as they are generated, some are allocated on the basis of various surrogate measurements, and some are unallocable and are, therefore, assumed to follow the pattern of allocated expenditures. Interestingly, the figures indicate that the overwhelming majority of MTA funds (exclusive, even, of fare revenues) are generated locally or regionally, as distinguished from statewide or federally-generated resources.

"Benefits" (or service provided) is assumed to be measured by the costs of providing service. The question of allocating revenues is difficult enough, but it is further complicated in this context by the question of whether there is a "right" way of identifying the beneficiary of a public service. The issue of allocating costs is one of the most controversial in the study of public finance. It is an issue which has bedeviled political economists for generations with no approach that has been universally acceptable. Costs can be allocated in a variety of ways: on a marginal cost basis, avoidable cost basis (which is much the same process), or on the basis of full allocation of all costs associated with all operations.

This study has chosen the fully allocated cost methodology because virtually any subordinate section of rail operations can be severed without reducing certain significant portions of overall rail costs. If any rail service is run, anywhere at all, certain of these costs will continue at their present levels, regardless of how much service is being provided. All costs, therefore, have been allocated and are assumed to be the "benefits" derived for each county, on the basis of residence of passenger (in the case of the transit system), and on the basis of passenger miles traveled (in the case of the commuter railroads).

TABLE II

Allocation of MTA Expenses & Revenues
Estimate for C.T. 1983
($ in millions)

	Total	NYC	Nass.	Suff.	Metr.	Put.	Dutch.	Orange	Rock.	Conn.	Other
Gross Operating Expense/ Passenger Benefits (excludes capitalized projects)	2119.0	1903.1	77.9	26.2	33.1	0.5	0.4	0.7	3.0	5.0	69.1
Internal Revenue Sources	288.0	268.9	9.8	3.2	4.1	0.1	•	0.1	0.4	0.6	8.8
Regional Revenue Sources											
Fares	1026.0	922.8	37.4	12.3	15.7	0.2	0.1	0.2	1.3	2.5	33.7
Other Revenue	20.0	18.8	0.6	0.2	0.6	–	–	–	0.1	0.1	0.4
Fare & Service Reimbursement	89.0	89.0	–	–	–	–	–	–	–	–	–
Connecticut DOT	–	–	–	–	–	–	–	–	–	–	–
MTA Surplus	117.0	78.5	11.2	4.5	8.0	0.1	0.1	0.9	0.9	1.9	12.9
Station Maintenance	–	–	–	–	–	–	–	–	–	–	–
Local Operating Assistance	81.0	81.0	–	–	–	–	–	–	–	–	–
Police & Car Overhaul	197.0	197.0	–	–	–	–	–	–	–	–	–
Mortgage Tax	9.0	5.8	1.0	1.0	0.8	–	0.2	0.2	0.2	–	–
Sales Tax	93.0	52.7	13.9	10.4	9.5	0.5	2.3	1.8	1.8	–	–
Gross Receipts Tax	38.0	19.3	6.7	5.3	4.2	0.3	1.0	1.2	1.0	–	–
Business Tax	135.0	84.4	17.8	12.8	11.8	0.5	3.0	2.5	2.4	–	–
Real Estate Tax	54.0	54.0	–	–	–	–	–	–	–	–	–
Subtotal	1851.0	1591.1	88.4	46.5	50.4	1.4	6.7	6.9	7.7	4.5	47.2
Net MTA Surplus/(Deficit)	0	(71.1)	20.3	23.5	21.4	1.2	6.3	6.3	5.1	0.1	(13.1)
Average Weekday Ridership (Prgrm. in Thousands)	5,014	4,589	183	80	77	1	0.5	1	6	12	184

Less than $50,000
Revised 4/29/83

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Table III
Allocation of Commuter Rail Expenses & Revenues
Estimate for C.Y. 1983
($ in millions)

	Total	NYC	Mass.	Suff.	Metr.	Put.	Dutch.	Orange	Rock.	Conn.	Other
Gross Operating Expense/ Passenger Benefits (excludes capitalized projects)	841.8	52.3	233.2	192.8	223.9	11.4	17.5	3.3	1.5	100.9	-
External Revenue Sources	107.8	8.2	42.2	35.8	14.8	0.8	1.3	0.5	0.3	3.9	-
Regional Revenue Sources											
Fares	332.9	8.8	104.5	88.2	88.7	3.1	4.7	2.4	1.1	51.8	-
Other Revenue	64.8	1.4	3.2	2.8	45.4	2.7	4.8	-	-	5.3	-
Fare & Service Reimbursement	-	-	-	-	-	-	-	-	-	-	-
Connecticut DOT	29.5	-	-	-	-	-	-	-	-	29.5	-
TMTA Surplus	85.8	55.6	8.1	3.5	5.8	0.1	0.1	0.8	0.8	1.5	9.3
Station Maintenance	54.3	32.8	11.3	4.4	5.1	0.2	0.7	-	-	-	-
Local Operating Assistance	28.8	1.3	7.9	5.1	5.8	0.3	0.3	0.1	-	-	-
Police & Car Overhaul	-	-	-	-	-	-	-	-	-	-	-
Mortgage Tax	13.8	0.1	1.5	1.4	1.3	.1	0.2	0.2	0.2	-	-
Sales Tax	28.1	15.9	4.2	3.2	2.8	0.1	0.7	0.8	0.5	-	-
Gross Receipts Tax	9.4	3.2	2.1	1.7	1.3	0.1	0.3	0.4	0.3	-	-
Business Tax	95.8	59.3	12.4	9.8	8.3	0.4	2.2	1.7	1.7	-	-
Real Estate Tax	-	-	-	-	-	-	-	-	-	-	-
Subtotal	734.8	188.8	155.2	121.1	143.8	7.1	13.2	6.8	4.4	87.9	9.3
Net MTA Surplus/(Deficit)	0	141.9	(35.8)	(36.7)	(64.4)	(3.5)	(3.8)	3.2	3.2	(14.2)	9.3
Average Weekday Pass. Miles (in Thousands)	11,948	388	3,647	3,878	2,499	112	189	114	53	1,994	-

Revised 8/10/83

Clearly, one can argue with this methodology if it does not produce the desired results for making subjective judgments with respect to the quality and cost of service being provided. We have made the judgment that these are the most equitable bases for these allocations. These assumptions have the effect of somewhat understating the use of the commuter rail system, for example, by New York City residents since there is no practical way, at the moment, to identify reverse commutation. On the other hand, they may be said to overstate, somewhat, the relative costs/benefits of providing service to the outer ends of the region.

Table IV shows the consolidated effects of the independent financing and cost structures of the transit system and the commuter railroads on a county-by-county basis. The results of these comparisons are summarized on Table V, where costs (or benefits) are displayed on the basis of the dollars of benefit per each dollar of revenue.

III.
CONCLUSIONS

On the basis of this analysis it seems clear that most of the jurisdictions within the MTA region are receiving net benefits from the current service and financing structure of the MTA. This results, in part, from the fact that certain revenues accrue to MTA by virtue of its position as a regional entity. A $1.00 figure would represent a break-even between contributions and benefits. The regional average is $1.15 of service per each $1.00 of revenue. Only Dutchess, Rockland, and Orange Counties fall below that dollar threshold, although Dutchess County is not substantially below it. Putnam County is the largest net beneficiary on this basis, although the dollar amounts are relatively small. Westchester, Suffolk and Nassau Counties are, similarly, large net beneficiaries, while the City of New York comes out slightly above the break-even threshold, as well.

Each county is likely to perceive its relative advantage or disadvantage in the context of its own budget circumstances. Thus, while the dollar amounts shown for Orange, Rockland, and Dutchess Counties are not large in the context of MTA's total financial structure, they loom very large, indeed, in the context of the local budgets of each of these jurisdictions.

Table IV

Allocation of Expenses & Revenues (TA & Commuter)

Estimate for C.Y. 1983

($ in millions)

	Total	MIC	Mass.	Suff.	Wstr.	Pol.	Fetch.	Orange	Redl.	Com.	Other
Gross Operating Expense/ Passenger Benefits (exclude capitalized projects)	2260.8	1955.6	311.1	319.6	256.1	11.9	17.9	6.9	4.5	111.3	69.1
External Revenue Sources	378.8	249.1	52.0	38.2	18.9	0.9	1.3	0.6	0.7	4.5	0.8
Regional Revenue Sources											
Fares	1198.9	931.2	141.9	189.5	84.4	3.3	4.8	2.8	2.4	54.1	33.7
Other Revenue	84.8	19.4	3.8	3.8	45.8	2.7	4.0	-	0.1	5.4	0.8
Fare & Service Reimbursement	89.8	89.8	-	-	-	-	-	-	-	-	-
Connecticut DOT	29.5	-	-	-	-	-	-	-	-	29.5	-
TMA Surplus	302.8	122.1	19.3	7.8	13.8	0.2	0.8	1.8	1.5	3.6	22.2
Station Maintenance	56.3	32.8	11.3	6.4	5.1	0.2	0.7	-	-	-	-
Local Operating Assistance	101.9	85.3	7.9	5.1	5.8	0.3	0.3	0.1	-	-	-
Police & Car Overhaul	197.8	197.8	-	-	-	-	-	-	-	-	-
Mortgage Tax	22.8	13.7	2.5	2.4	2.1	0.1	0.4	0.4	0.4	-	-
Sales Tax	121.1	66.6	18.1	13.6	12.4	0.6	3.8	2.5	2.3	-	-
Gross Receipts Tax	30.4	12.5	3.8	7.9	5.5	0.4	1.3	1.0	1.3	-	-
Business Tax	230.8	143.7	30.8	21.5	29.1	0.9	5.2	4.2	4.1	-	-
Real Estate Tax	54.8	54.8	-	-	-	-	-	-	-	-	-
Subtotal	2585.8	1777.1	343.8	187.6	194.1	8.7	19.8	12.3	12.1	92.4	56.5
+/- MTA Surplus/(Deficit)											
TA	0	(71.1)	20.3	23.5	71.4	1.2	5.3	6.3	5.1	0.1	(13.1)
Commuter Rail	0	141.9	(35.7)	(38.8)	(84.4)	(3.5)	(3.0)	3.2	3.2	(16.2)	9.3
Combined	0	70.8	(15.4)	(13.3)	(43.0)	(2.3)	3.3	9.5	8.3	(16.1)	(3.8)
Ratio of Pax Benefits to Regional Revenue Sources	1.15	1.19	1.29	1.31	1.32	1.37	0.90	0.91	0.97	1.20	1.22
Fare Box Contribution to Operating Expense	46.1	47.6	45.6	46.2	33.1	28.0	27.1	60.4	51.1	48.7	48.8

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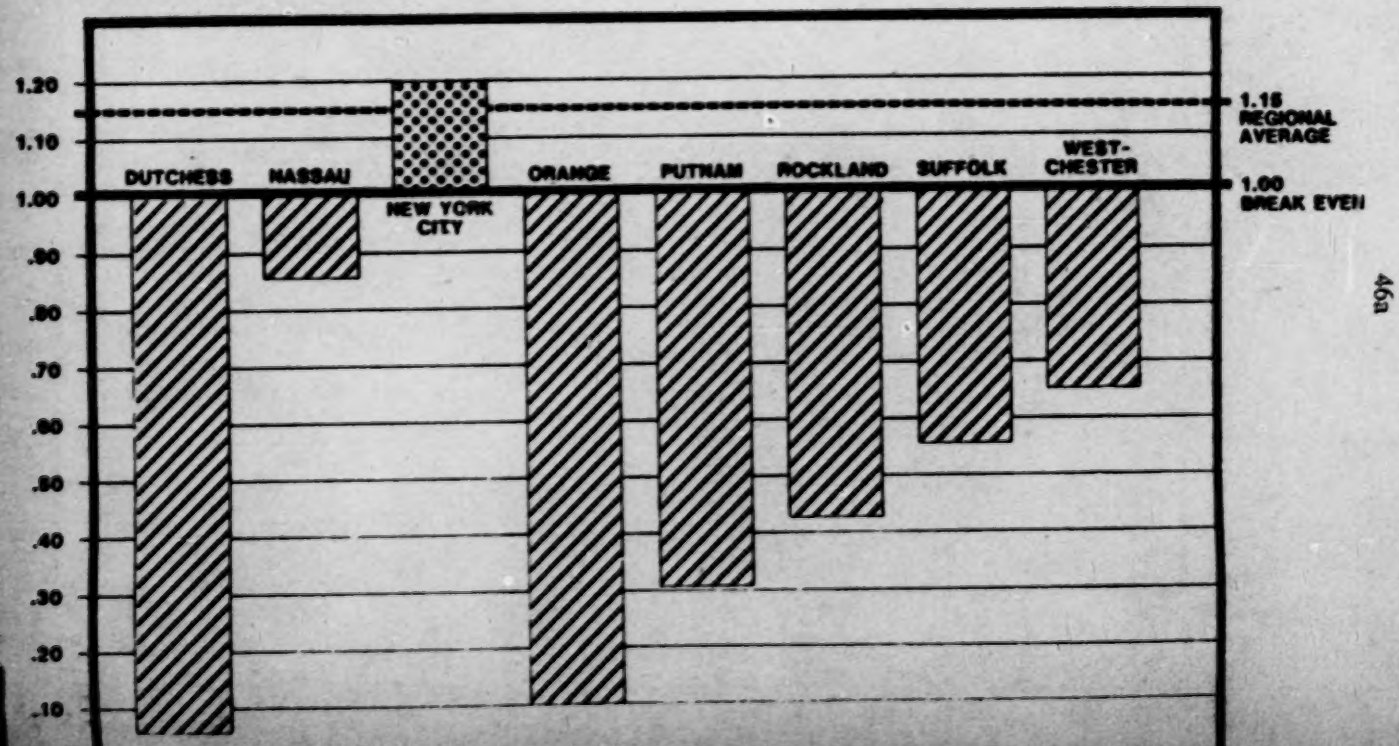
TABLE V
Comparative Services and Revenues
Estimate for C.Y. 1983

County	Cost of Passenger Services Received By County ($ in millions)	Revenues Generated by County of Revenues	County Benefit per $1 of Revenues
Transit Services			
Dutchess	0.4	6.7	0.06
Nassau	77.9	88.4	0.88
New York	1903.1	1591.1	1.20
Orange	0.7	6.9	0.10
Putnam	0.5	1.6	0.31
Rockland	3.0	7.7	0.39
Suffolk	26.2	46.5	0.57
Westchester	33.1	50.4	0.66
REGIONAL AVERAGE	2119.0	1851.0	1.15
Commuter Services			
Dutchess	17.5	13.2	1.32
Nassau	233.0	155.2	1.50
New York City	52.3	186.0	0.28
Orange	3.3	6.0	0.55
Putnam	11.4	7.1	1.61
Rockland	1.5	4.4	0.28
Suffolk	192.8	121.1	1.59
Westchester	223.0	143.8	1.55
REGIONAL AVERAGE	841.0	734.0	1.15
MTA Total			
Dutchess	17.9	19.9	.90
Nassau	311.1	243.6	1.28
New York	1955.4	1777.1	1.10
Orange	4.0	12.9	.31
Putnam	11.9	8.7	1.37
Rockland	4.5	12.1	37
Suffolk	219.0	167.6	1.31
Westchester	256.1	194.2	1.32
REGIONAL AVERAGE	2960.0	2585.0	1.15

COMPARATIVE SERVICE AND CONTRIBUTION LEVELS - TRANSIT SERVICES

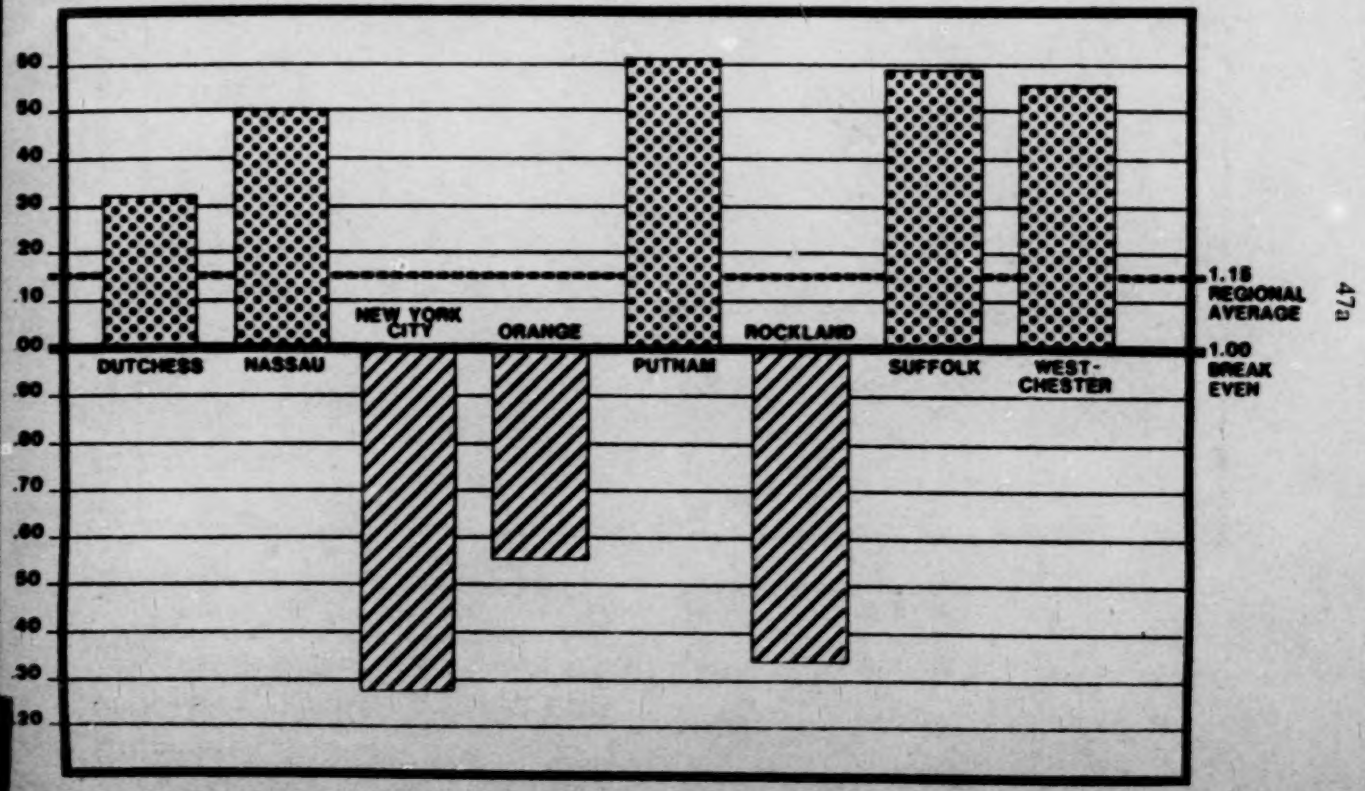
COST OF SERVICE LEVELS PER $1.00
OF REVENUE CONTRIBUTION
ESTIMATE FOR CALENDAR YEAR 1963



CONTRIBUTION LEVELS - COMMUTER SERVICES

COST OF SERVICE LEVELS PER $1.00
OF REVENUE CONTRIBUTION

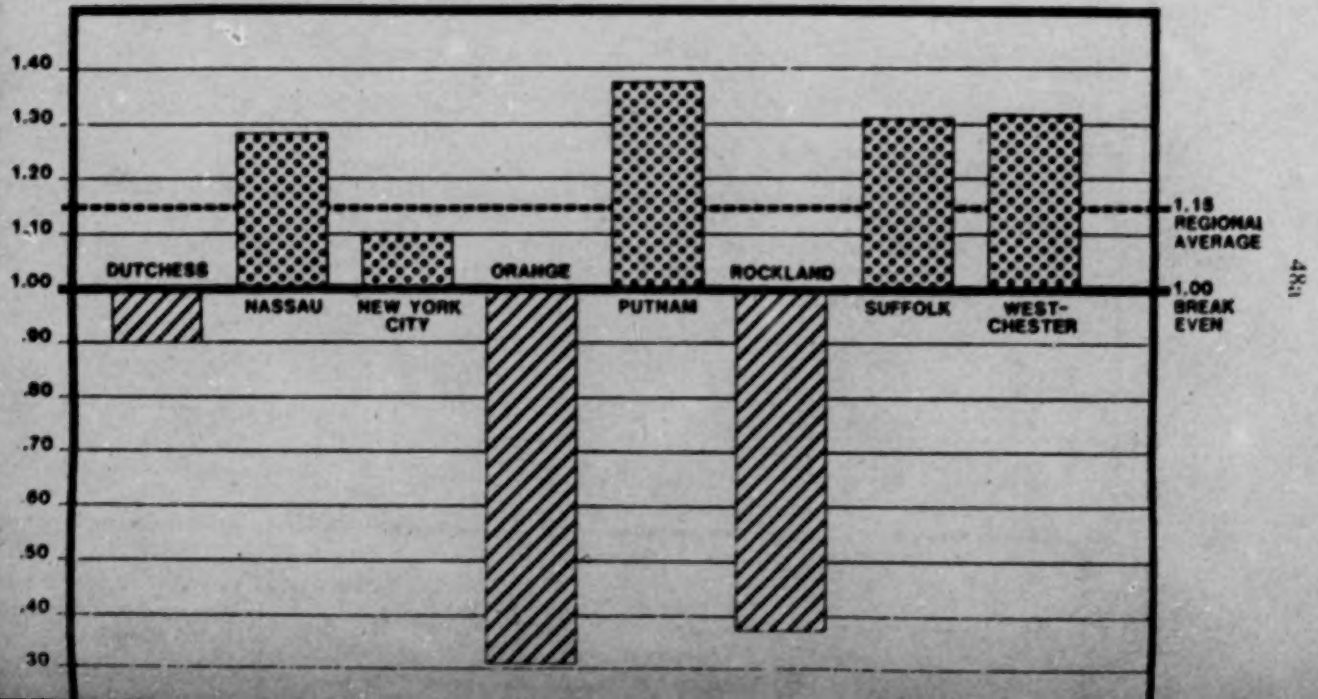
ESTIMATE FOR CALENDAR YEAR 1983



COMPARATIVE SERVICE AND CONTRIBUTION LEVELS - MTA TOTAL

COST OF SERVICE LEVELS PER $1.00 OF REVENUE CONTRIBUTION

ESTIMATE FOR CALENDAR YEAR 1983



4Rail

APPENDIX A

DEFINITIONS

oss Operating Expenses/Passenger Benefits
l operating expenses including reimbursable expenses (except ose which are capital in nature) of the various mass ansportation agencies of the Metropolitan Transportation thority (MTA).

NYCTA
Based on an annual rate derived from the approved 18 month operating budget, covering the period July 1, 1982 through December 31, 1983.

LIRR and MNCR
Based on approved budgets and financial plans for calendar year 1983.

ternal Revenue Sources
venues whose source(s) cannot be identified with any particular rtion of the region. Includes appropriations from the General nd of the State of New York, New York State taxes (e.g., "Long nes" and "Unitary") which have a statewide base, and Federal erating Assistance. Credited to the services to which they are propriated. Examples are as follows:

Revenue from Freight Operations
Derived from and credited to LIRR.

Freight Deficit Appropriation
Credited to LIRR.

NYS Operating Assistance Appropriations
Credited as appropriated.

NYS Non-Allocable Taxes (Unitary & Long Lines)
Credited as appropriated in the amounts made available from payments remitted or from general fund.

Federal Aid
Credited as provided in annual regional division of funds made available to the metropolitan region.

Regional Revenue Sources
Revenues whose source(s) can be attributed to specific counties (N
York City is treated as a single county for this purpose) eith
directly, or by some reasonable inferences from the way in which t
revenue is generated.

Fares
Revenue paid by passengers, directly.

Other Revenues
Revenues generated by activities associated with operations. Includes a variety of sources such as charges, fees, licenses, rentals, concessions, advertising, trackage or other user charges. Credited to specific operating agencies as generated.

Fare and Service Reimbursements
Payments made to the New York City Transit Authority (NYCTA) on behalf of specific classes of passengers. Includes payments based on the differences between the fare actually deposited by school children, Senior Citizens, and disabled riders, and the amount that each would have paid had he paid the full fare. Credited to NYCTA.

Connecticut DOT
Reimbursement to MTA of the Connecticut share of the deficit, generated by the operations of the New Haven service. Credited to Metro-North Commuter Rail Road (MNCR).

TBTA Surpluses
Funds provided to the MTA from the Triborough Bridge and Tunnel Authority (TBTA) based on the differences between operating revenues and operating expenses. Credited to MTA agencies as follows: the first $24 million to the NYCTA; all remaining surplus is divided 50% to the NYCTA and 50% to the MTA commuter railroads.

Station Maintenance Assessments
Payments made to MTA as reimbursement of commuter railroad expenses associated with the maintenance, operations, and use of commuter railroad stations in each county. Each county's contribution is identified and credited to the account of the railroad which incurred the initial expenses.

Police and Car Overhaul Reimbursement
The City of New York reimburses the NYCTA for costs incurred in providing police protection and car overhaul activities. Credited to NYCTA.

Mortgage Recording Tax (Regional)
A tax of 1/4% imposed on all mortgage recording transactions in each county, earmarked for the operating expenses of the regional transportation authority (MTA). Credited proportionally to gross expenses of NYCTA and commuter operations. Balance of available funds are credited to the commuter railroads.

Local Match to State Operating Assistance
Payments to MTA required by the Transportation Law and annual appropriation legislation. Localities are required to match a portion of the State's operating assistance to the various MTA agencies. Credited in the manner prescribed by statute for assessing the counties.

Sales Tax
A tax of 1/4% imposed on sales in the region. Statute prescribes the deposit of the proceeds to a dedicated transportation operating assistance fund and the allocation of the proceeds among transit operators in the region. Based on receipts as reported by NYS Department of Taxation and Finance for twelve months ending September, 1982.

Mortgage Recording and Transfer Taxes
A tax on mortgage transfers and on mortgage recording transactions within the City of New York. Earmarked for the NYCTA by statute.

Corporate Franchise Tax Surcharge
Regional surcharge of 17% on payments required under the statewide corporate franchise taxes. Credited as apropriated in annual appropriations legislation.

Fare Box Coverage Ratios
The proportion of operating expenses "covered" by operating revenues.

Gross Fare Box Coverage Ratio
Directly-paid fares as a percentage of total expenses (including reimbursable expenses such as police, NYCTA car overhaul, commuter railroad station maintenance, Connecticut reimbursement, etc.

Net Fare Box Coverage Ratio
Fares (including fare reimbursements) as a percentage of net (non-reimbursable) expenses.

APPENDIX B

ALLOCATIONS

ith certain exceptions enumerated below, expenses and revenues have een allocated as follows:

Transit System
Allocated on the basis of county of residence of passengers, based on census data and various origin/destination studies, uses average weekday ridership as base.

Commuter Railroads
Allocated on the basis of passenger-miles traveled by commuters, by county of residence, based on monthly ticket sales, various regional models, census data, and special studies; uses average weekday passenger revenue miles as a base..

xceptions to this rule are as follows:

Fare and Service Reimbursement
Contributed from the general fund of the City of New York and allocated to NYC, only.

TBTA Surplus
Allocation is based on residence of user from vehicle origin/destination traffic studies for 1979, 1973 and 1956.

Station Maintenance Assessments
Attributed to counties based on actual billings which would correspond to expenses incurred and charged to the counties on the expense side.

Local Match to State Operating Assistance
Mandated local City and county match to State operating assistance program payments. Allocated to counties based on actual payments.

Police and Car Overhaul Reimbursements
See 'Fare and Service Reimbursement,' above.

Gross Receipts Tax (3/4¢)
Estimated collections allocated to the City and counties in the same ratio as the distribution of gasoline sales by county (75% of the tax levy comes from the retail sales of gasoline).

Mortgage Recording Tax (Regional)
Expenses paid from the proceeds of this tax, are divided in proportion to NYCTA and commuter rail expenditures and allocated to counties in the same way that other expenses are allocated (see ¶ 1, 2 above). Revenues are credited to the counties as generated.

Sales Tax
Allocated by county, based on each county's percentage of statewide sales tax collections, as calculated by the NYS Department of Taxation and Finance.

Mortgage Recording and Transfer Taxes
Earmarked for the NYCTA by statute. Allocated to NYC, only.

Corporate Franchise Tax Surcharge
Estimated collections allocated to counties approximating the current formula under the tax, by weighing, equally, the percent share of employment and sales tax revenue, by county. Actual receipts for most taxpayers cannot be identified by county.

Office of the Clerk, Supreme Court, U.S.
FILED
OCT 17 1983
ALEXANDER L. STEVAS, CLERK

No. 83-430

IN THE

Supreme Court of the United States

October Term, 1983

LOUIS HEIMBACH, individually and as County Executive of Orange County, on behalf of all persons in Orange County liable for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York; and PETER F. COHALAN, individually and as County Executive of Suffolk County, on behalf of all persons in Suffolk County liable for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York,

Appellants,

against

THE STATE OF NEW YORK and JAMES H. TULLY, JR., as the Commissioner of the New York State Tax Commission,

Appellees,

WARREN M. ANDERSON, as Temporary President and Majority Leader of the New York State Senate,

Intervenor-Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS AND/OR AFFIRM

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Dated: October 14, 1983

Questions Presented

1. Whether N.Y. Tax Law § 1109, increasing a general sales tax within certain counties for purposes of funding mass transit services violates the Equal Protection Clause solely because some taxpayers in some counties may receive less direct or indirect benefit from the revenue raised thereby than other taxpayers on whom the tax is imposed, where the record is undisputed that the revenue raised will be applied for transportation services in every affected county.

2. Whether N.Y. Tax Law § 1109 violates the Equal Protection Clause on the contention that such counties differ in geographic, economic, and demographic respects, where (1) the record is absolutely barren of any evidence to support such contention and (2) the record is undisputed that all such counties are linked demographically and economically for the purposes of operating an adequate transportation system among such counties so as to afford a rational basis for the statute.

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No. 83-430

IN THE

Supreme Court of the United States

October Term, 1983

LOUIS HEIMBACH, individually and as County Executive of Orange County, on behalf of all persons in Orange County liable for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York; and PETER F. COHALAN, individually and as County Executive of Suffolk County, on behalf of all persons in Suffolk County liable for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York,

Appellants,

against

THE STATE OF NEW YORK and JAMES H. TULLY, JR., as the Commissioner of the New York State Tax Commission,

Appellees,

WARREN M. ANDERSON, as Temporary President and Majority Leader of the New York State Senate,

Intervenor-Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS AND/OR AFFIRM

Appellees, State of New York and Hon. Roderick Chu, as Commissioner of Taxation & Finance* in the above entitled cause, move to dismiss and/or affirm on the ground that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as to need no further review by this Court.

* Commissioner Chu succeeded to the office of Commissioner of Taxation and Finance in January, 1983.

Counter-Statement of the Case

This appeal has been noticed by plaintiffs-appellants from a unanimous decision of the New York State Court of Appeals, 59 N.Y.2d 891 (1983), sustaining the constitutionality of New York Tax Law § 1109, L. 1981, Ch. 485. This statute increases, by one-quarter of one per cent, the sales and compensating use tax applicable in the twelve counties of the State of New York which are serviced by the Metropolitan Transportation Authority ("MTA") and which collectively comprise the Metropolitan Commuter Transportation District ("the District"), N.Y. Public Authority Law § 1262. All of the revenue raised by the increase in the sales tax in the District will be applied for transportation services provided by the MTA within the District.

Appellants' arguments were fully addressed and unanimously rejected by the intermediate appellate court, *Heimbach et al.* v. *State et al.*, 89 A.D.2d 138 (1982) and again by the Court of Appeals, 59 N.Y.2d 891 (1983). These contentions are utterly devoid of merit based upon a long line of controlling opinions of this Court stretching back over a century.

ARGUMENT

Appellants Have Not Stated a Valid Cause of Action Under the Equal Protection Clause, and Summary Judgment Dismissing Their Claims Was Fully Warranted.

In their first two causes of action appellants alleged that the amount of sales tax to be collected in Orange and Suffolk Counties under Chapter 485 was so much greater than the value of MTA services and facilities to the taxpayers therein that the tax lacked a reasonable basis and thereby denied them equal protection (Compl. ¶¶ 3, 19, 20, 22, 24, 25, 26, 30, 32, 35, 36; A 10, 14-19).* Their complaint specifically alleges a theory of disproportionate burdens for benefit received in paragraphs 22, 25, 26, and 32 (A 7-9) which they reiterate in their Jurisdictional Statement at 6-11. Second, they argue that the sales tax increase is actually a "special assessment", and one that is void precisely because the burden outweighs the benefit (Jurisdictional Statement at 7-10). Third, they contend that Orange and Suffolk Counties are so dissimilar to other counties in the District as to make their inclusion in the taxing scheme irrational. Appellants' arguments both ignore the unrebutted factual record in this case and proceed in utter disregard of numerous opinions by this Court in which similar claims repeatedly have been rejected.

Submitted with appellees' cross-motion for summary judgment was an affidavit of David Plavin, Executive Director of the MTA, which thoroughly refuted appellants' erroneous implication that MTA services in these two counties are either insignificant or peripheral to the MTA's overall capital and operating programs (A 64-71). The

* "A —" denotes references to the Appendix on Appeal used in the appellate courts below.

Plavin affidavit details the various transportation services which the MTA provides in these counties, *e.g.*, the Port Jervis line in Orange County for which new cars and locomotives have been acquired (¶ 9) (A 68), Stewart Airport, in which MTA has invested over $30 million in capital improvements (¶ 10) (A 68), as well as upgrading the Long Island Railroad in Suffolk County. Moreover, Mr. Plavin provided sound reasons why Orange and Suffolk Counties were originally included, and continue to be, in the District based on demographic, geographic and economic factors (¶¶ 5-8, A 66-79).

At no time did appellants offer factual evidence whatsoever to rebut these assertions, and there is clearly a sufficient nexus between the tax and the transportation services provided in Orange and Suffolk Counties which the tax will help subsidize.* Thus, as a matter of law, it is neither

* In misleading fashion, appellants have appended to their Jurisdictional Statement an MTA report on cost/benefit ratios among the various counties which they never sought to include in the record below. The MTA Report calculates a cost/benefit ratio based on numerous revenue sources of which Tax Law § 1109 is only one. It is completely erroneous for appellants to cite the cost/benefit ratio for Orange County as if this ratio was based solely on revenue raised and spent under § 1109.

The appellants, moreover, ignore the fact that other counties within the District provide direct subsidy to MTA services or impose other taxes which do not apply in Orange County, *e.g.*, real estate tax. Appellants also ignore the fact that, according to the Report, Suffolk County, whose County Executive, Peter Cohalan, is a co-appellant, achieves one of the most favorable cost/benefit ratios of the twelve Counties in the District. Report, Table IV, reprinted at Jurisdictional Statement, 44a.

Even if appellants' facts were more accurately stated this would not control the constitutional issue given the Court's longstanding rejection of cost/benefit claims in adjudicating the validity of general taxes under the Equal Protection Clause. While the Report may offer policy arguments for Orange County to be excluded from the District, these arguments are, of course, appropriate for the State Legislature, not for this Court.

irrational nor invidious to include these counties within the statute's scope. Not only will MTA services in these two counties be funded partially from the tax, but the two counties have long been part of the Commuter Transportation District and two MTA Directors are selected with the participation of the County Executives of the two counties. Public Authorities Law, §§ 1262, 1263(a). In addition, as part of the same comprehensive legislation that included the subject tax increase, the Legislature specifically broadened the opportunity for residents of these two counties to participate in formulating MTA policies. Public Authorities Law, §§ 1266-d, 1266-e.

It was incumbent upon appellants to rebut specifically the detailed factual proof contained in the Plavin Affidavit and Exhibit (A 64-121), which appellees submitted to obtain summary judgment. Instead, they relied solely on conclusory allegations to sustain their equal protection claims.

In this challenge to a tax classification on equal protection grounds, appellants must demonstrate that no rational basis can be conceived to justify the classification. *Allied Stores* v. *Bowers,* 358 U.S. 522, 528 (1959). Indeed, this Court has recently reiterated that legislative classifications in taxation challenged on equal protection grounds are unassailable so long as their rationality is even "debatable". *Western & Southern Life Insurance Co.* v. *Bd. of Equalization,* 451 U.S. 658 (1981), *citing U.S.* v. *Carolene Products,* 304 U.S. 144, 154 (1938). The evidence on this record indicates that the reasonableness of this legislation is more than merely arguable; its reasonableness is readily apparent, given the importance of adequate funding for critical mass transit needs, the undisputed fact that some portion of the

revenue raised by the tax will be spent for transportation services in the two counties, and the unrebutted evidence demonstrating the interrelationship of these counties to the other counties of the District.

Appellants are hardly the first taxpayers to advance their theory of disproportionate tax burdens. In virtually every case for nearly a century, this Court has dismissed nearly identical arguments. *See, e.g., Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-22 (1937); *Memphis & Charleston Ry. Co.* v. *Pace*, 282 U.S. 241 (1931); *Missouri Pacific Ry. Co.* v. *Rd. Improvement Dist.*, 266 U.S. 187 (1924); *St. Louis & S.W. Ry. Co.* v. *Nattin*, 277 U.S. 157 (1927); *Dane* v. *Jackson*, 256 U.S. 589 (1921); *Southern Pac. Co.* v. *Kentucky*, 222 U.S. 63 (1911); *Wagoner* v. *Evans*, 170 U.S. 588 (1897). *See also*: *Becker* v. *Levitt*, 489 F.2d 1087 (2d Cir. 1973); *American Commuters Assn.* v. *Levitt*, 279 F. Supp. 47 (S.D.N.Y. 1967), *aff'd*, 405 F.2d 1148 (2d Cir. 1968) (commuter tax upheld against argument by nonresidents of denial of equal protection as to benefits received).

In *Carmichael* v. *Southern Coal & Coke Co., supra*, this Court decisively laid to rest exactly the same kind of claim which these appellants tender. There a taxpayer sued to invalidate the unemployment compensation payroll tax on the ground, *inter alia*, that it did not benefit from the expenditures funded from the tax proceeds. Rejecting the equal protection argument, Justice Stone stated:

> It is not a valid objection to the present tax, conforming in other respects to the Fourteenth Amendment, and devoted to a public purpose, that the benefits paid and the persons to whom they are paid are unre-

lated to the persons taxed and the amount of the tax which they pay—in short, that those who pay the tax may not have contributed to the unemployment and may not be benefited by the expenditure.

* * *

A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. See *Cincinnati Soap Co.* v. *United States, supra.* Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good. A corporation cannot object to the use of the taxes which it pays for the maintenance of schools because it has no children. *Thomas* v. *Gay,* 169 U.S. 264, 280. *This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him. Cincinnati Soap Co.* v. *United States, supra; Carley* v. *Hamilton & Snook, supra,* 72; *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U.S. 249, 268; see *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U.S. 194, 203. (301 U.S. at 521, 523; (emphasis added).

Appellants make the startling claim that § 1109 creates a "special assessment" which illegally burdens them in disproportionate fashion. Appellants do not cite a single deci-

sion whereby a general sales tax applied to an infinite multitude of variegated transactions by millions of persons every day has ever been judicially treated as a "special assessment" simply because the sales tax is imposed on a particular geographic area. Under appellants' reasoning, every sales tax or excise tax imposed in a locality would constitute a "special assessment", thereby stripping the latter term of any meaning.

In both *Illinois Central R.R. Co.* v. *Decatur*, 147 U.S. 190 (1892) and *Village of Norwood* v. *Baker*, 172 U.S. 269 (1898), relied on by appellants, the Court drew a very clear distinction between general taxes, in return for which no peculiar benefit need be given to taxpayers, and "special assessments", which "proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for its improvement." *Illinois R.R. Co., supra*, at 198.

Unlike a special assessment for streets, water supplies or sewers, there is not the slightest evidence that the one-quarter per cent increase in the sales tax applies the theory that the particular property in the District subject to the tax would gain in value from transportation services funded thereby as opposed to a general societal benefit in efficient transportation. Clearly, the Legislature was not acting upon appellants' absurd notion that a household appliance or a pack of chewing gum, sold subject to the sales tax, would be more valuable because the Long Island Rail Road obtained new coaches or the New York City subways new signal lights. Rather, these transit improvements are a service of State government intended to benefit residents,

businesses, and visitors within the District generally, without regard to the value of any particular real estate or personalty. Indeed, the challenged tax is not even applied to sales of real property. See N.Y. Tax Law § 1105.

Appellants also argue that because Orange and Suffolk Counties are economically, demographically and geographically different from the remainder of the District, § 1109 should not apply to them to the same extent as the other ten counties. This cavil has no more validity than their other contentions. Appellants have made no factual showing as to all of these asserted differences.

Even if they had done so, however, any economic or demographic differences are not material under the governing equal protection clause standard. It is undisputed that there are MTA services and facilities in those counties, utilized by residents of those counties, that are either directly or indirectly subsidized with the revenue raised by the sales tax increase. It is also undisputed that there are significant economic and social links between these two counties and the rest of the metropolitan area in which the MTA operates (A 66-68) such that transportation improvements throughout the metropolitan area benefit commuters, businesses and consumers in these two counties. It is undisputed that residents of these two counties have an opportunity to participate in MTA's policy deliberations, Public Authorities Law §§ 1263(1)(a), 1266-d, 1266-e, and appellants have never challenged the inclusion of the two counties in the District since 1968 under Public Authorities Law § 1262.

Whatever may be the result if residents of a county located hundreds of miles from the nearest MTA facility were specially taxed to provide revenues exclusively earmarked for the Long Island Railroad or for commuter lines in Orange County, it is surely reasonable to include Orange County and Suffolk County in the taxing scheme to help improve transit facilities which either directly or indirectly benefit residents, visitors and businesses therein and which are essential to a healthy regional economy. Appellants have failed utterly to demonstrate any palpable arbitrariness in the statute so as to establish its invalidity. *Regan* v. *Taxation with Representation of Washington*, —— U.S. ——, 76 L.Ed. 2d 129, 138 (1983), *citing Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973) and *Madden* v. *Kentucky*, 309 U.S. 83, 87-88 (1940). *See also, Salzburg* v. *Maryland*, 346 U.S. 545 (1954); *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961) (geographic classifications upheld if rationally related to legitimate state interest).

Appellants have failed to advance any proof that ¶ 1109 lacked a conceivable basis in reason so as to overcome the presumption of constitutionality that the statute enjoys. *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). As a matter of law, therefore, the mere absence of an exact equivalence between revenue raised and revenue expended cannot invalidate a general tax that unquestionably bears a rational relationship to a legitimate, indeed a vital, state interest in insuring adequate transit service throughout the New York metropolitan area.

Conclusion

Having failed to present any facts or applicable law to raise even a semblance of a substantial constitutional issue, appellees respectfully contend that the instant appeal be dismissed or affirmed.

Respectfully submitted,

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